Power Dynamics in Global Communication Governance: Internet Regulation and the Case of ICANN (1998 – 2002)

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Abstract

Power Dynamics in Global Communication Governance: Internet Regulation and the Case of ICANN (1998 – 2002)

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The Internet Corporation for Assigned Names and Numbers (ICANN) was created by the U.S. government in October 1998 as an institutional innovation – a private non-profit corporation to govern global resources without government involvement, in the public interest. Through the creation of ICANN, the neoliberal governmentality of market self-regulation and "stakeholder collaboration by consensus" was introduced to the field of global communication. This is considered in the present thesis as a particularly important step towards the establishment of a new governance paradigm for the digital age.

ICANN is approached in the thesis as a network of interdependencies and a power-production network, while power is constituted as the focal variable of this investigation. 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.

As a particular contribution to the conceptualization of the contemporary paradigmatic change in governance, this approach brings together theoretical constructs from Political Philosophy (Foucault's postmodern ontology of power), Political Science

and International Relations (the globalization perspective), and Organization Studies (the organizational approach to power in multistakeholder formations).

By recreating the chronological process of ICANN's first four years and focusing on its power dynamics, it was concluded that the power holders within ICANN (the technical cadre as managers) compromised the very idea of self-governance as they allowed the process to divert from the innovative stakeholder-consensus-building formula and slip back to traditional top-down policymaking. The world's governments and international organizations were, virtually, invited to take over the policy-legitimizing role that an at-large membership and the consensus-reaching process had been intended to play.

This thesis takes on further significance - in light of the unfolding global debate on Internet governance that has emerged in the wake of the United Nations World Summit on the Information Society (WSIS). The thesis thus contributes to the conceptualization of 21st century governmentality as "shared power" among diverse stakeholders in global public-policy (GPP) networks by proposing an original interpretation of these entities as networks of interdependencies, where transformative social energy is generated and accumulated. This, itself, constitutes a contribution to our understanding of social power and to the emerging field of global governance.

To those who love me and never said "give up" –

my wonderful parents Lillia and Boris

who taught me honesty and persistence,

my strong-willed husband Dimitre

who promised victory and achieved it,

and my smart and courageous children Lillia and Lubomir

who have just begun their own long journeys.

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Introduction

I believe that the industrial age paradigm of government passing laws and regulations to protect privacy, content, etc. does not work in a digital age... I do not think that there will be a huge ITU, which while it may have been good for the industrial age, is not applicable for a decentralized medium and it may encroach on freedom and innovations. Instead, we may see a series of private not-for-profit organizations such as the IETF, IAB and others for new numbers of players and other stakeholder bases. As they evolve, governments will need to evolve legal recognition of them... I am not quite sure where this is headed. In any case, all are headed towards a new legal and economic paradigm for the digital age.

Ira Magaziner, Statement at the open meeting
with the Asia-Pacific Internet Association (APIA)
Board and members,
Manila, Philippines, February 17, 1998

The U.S. government's decision to privatize the Internet Domain Name System (DNS)[1] management[2], as presented further by the presidential policy adviser Ira

[1] See Appendix A for a list of acronyms.

[2] The task of creating a self-regulatory regime for private and competitive governance of the DNS was first formulated in the U.S. government *Framework for Global Electronic Commerce* (July 1, 1997). It was further substantiated in *A Proposal to Improve Technical Management of Internet Names and Addresses*, the Green Paper (January 20, 1998), and *Management of Internet Names and Addresses. Statement of Policy*, the White Paper (June 5, 1998). The documents were prepared by the U.S. Administration's Interagency Working Group, led by Ira Magaziner and the National Telecommunications Information

Magaziner in the above-quoted statement, led to the creation of the Internet Corporation for Assigned Names and Numbers (ICANN) (October 1998) as a private non-profit corporation to govern global resources without government involvement in the public interest. This institutional innovation is considered in the present thesis as a particularly important step towards the establishment of new governance "paradigm for the digital age". Through it, the neoliberal governmentality of market 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.

Indeed, as it is argued throughout the thesis, the inauguration of ICANN reflected the governmentality of its time. The idea of transferring governmental responsibilities to the private sector under the formula of "self-governance-in-the-public-interest" was enabled by the transformation of the Internet from a network limited to use in scientific circles to a global mainstream medium of communication and commerce, and by the accumulated experience of the U.S. private sector in "responsible corporate management".

The transfer of authority over the Internet address and name spaces from the U.S. Department of Commerce (DoC) 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 European Union (EU) and the International Telecommunications Union (ITU) were not ready to stay on the sidelines when decisions on such important issues of the real world

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Administration (NTIA) on the basis of public consultation (see Chapter 4.3.3). In these documents, a governance regime based on global stakeholder collaboration was outlined.

as domain-name trademark conflicts or the level of central regulation of country-code top-level domains (ccTLDs) would be made by the new corporation.

Out of the volatile combination of the excitement with this experiment in global governance and behind-closed-doors negotiations among key stakeholders, ICANN was born. Thus, the thorny road of power politics began over who could influence the outcomes of ICANN's policy process.

The first four years of ICANN's activity constitute the time-boundaries of the present investigation, as the most significant policies on regulating a common pool resource – the Internet domain-name space – were put in place in this time-period 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 U.S. DoC. Yet, the transition to assuming complete authority over the Internet DNS management stumbled over the time-consuming collaborative policy-making process.[3] By the Fall of 2000, it seemed that, like the Tower of Babel, ICANN was doomed to fail as an experiment in managing global resources by the private sector's self-regulation and consensus-seeking. There were too many irreconcilable interests involved in the debates and too much pressure exerted on the ICANN Board by powerful players from national governments, international organizations, and American and European corporations. In addition, ICANN's management was constantly criticized by free-market and libertarianism

[3] Ultimately, 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" (*U.S. Principles on the Internet's Domain Name and Addressing System*, June 30, 2005). This meant, apparently, that the U.S. government intended to retain its authority over the root indefinitely.

champions for ignoring users' concerns and the interests of the small businesses emerging in the domain-name registration market.

In 2001, strong oppositional voices of two extremely powerful stakeholder groups – the ccTLD operators and the regional Internet registries (RIR) managers – joined the voices of dissent against ICANN's centralized management positions. ICANN was on the verge of either collapse or reform by the Fall of 2001.

The crisis in the experimental global governance entity was quite frankly acknowledged and correctly dissected by ICANN President and CEO Stuart Lynn in February 2002. In *Proposal for a Reform* he presented a model, which abandoned a number of distinct features of the consensus self-regulatory model, steering the much-needed reform process towards the well-known and stable grounds of an international standard-setting organization, although still open to participation of private sector actors. This was not what many stakeholder groups in ICANN were campaigning for. As a result, a good part of 2002 was devoted to debating in which direction ICANN should develop further.

By the end of 2002, ICANN was ready to adopt new bylaws, which effectively normalized the 1998 wild dream of self-regulation and policy-making by consensus. The experimental phase in global governance by self-regulation was over as a new set of policy issues in Internet domain-name space appropriation and regulation was constructed and a new cluster of interested stakeholders was ready to enter the policy-making arena.

In essence, as a hybrid postmodern[4] creation in the institutional arena, ICANN confirmed the U.S. government's assumption that a fast-evolving technology such as the globally distributed Internet needed a highly flexible and promptly adjustable governance mechanism. Stakeholder policy-making by consensus was the working formula for the new digital-age governance paradigm.

ICANN 1.0 (1998 – 2002; in the participants' jargon) and the power dynamics of its innovative policy-making process constitute the arena of investigation for the present thesis. Subscribing to the critical and postmodern philosophy postulate that social practices are constructed in and by historically specific matrixes of power relations, I constitute power as the focal variable of this investigation. It was the principal hypothesis of my investigation that the policy-making process in ICANN was a subject of power-politics, although it was designed as a transparent all-inclusive consensus-seeking interaction based on a complex of stakeholder interdependencies. After all, the regulatory regime for the domain-name registration market was produced by a conglomerate of participants with differing agendas at a stage when property-rights issues were debated. To test this hypothesis, the investigation focused on 1/ identifying the instances of power politics in the collaborative process; 2/ identifying the ownership of the different power strategies; 3/ analyzing the effectiveness of the power strategies applied; and, 4/ outlining the "missed opportunities" in the Internet domain-name space development because of the outcomes of the power struggle. Thus, the applied process-oriented approach was able to lead the investigation to some answers of the "what, who, how, and why" questions

4 "Postmodern" here refers to "fragmentation of authority", which is accepted as a defining feature of postmodernity.

and, in addition, was instrumental in contextualizing the development of the Internet DNS policies in ICANN.

The public discourse on Internet governability, as presented in Chapter 1, defined the intellectual environment in which ICANN was conceived and functioned in its formative years. The competing views on the level of government intervention in regulating the globally distributed network, it is suggested, had influenced the range of academic reflections on the Internet DNS privatization policy and its implementation by ICANN.

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 U.S. legal scholars in the academic debate on ICANN, though, has limited it to issues of legitimacy and 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.

In contrast, the present thesis approaches ICANN as a network of interdependencies and a power-production network. As a particular contribution to the conceptualization of the contemporary paradigmatic change in governance, this approach brings together theoretical constructs from different social-science fields, which exhibit particular ontological proximity - namely, a common concern with the shifting locus of political power from nation states to the supranational level.

The claim of entering a paradigmatic change in governance, I argue in Chapter 2, requires investigating the deepest mechanism of the political process in a stakeholder-consensus setting. In so doing, I juxtapose the findings not only to the original model as designed by the U.S. authorities, which has been the privileged scholarly approach, but also to the common dynamics of collaborative processes as formulated by researchers in Interorganizational Studies and Management Studies.

As the focal variable of the investigation, power is conceptualized in this thesis on three levels by mobilizing contemporary theoretical frameworks: 1/ Foucault's postmodern ontology of power (Political Philosophy), which has engendered Governmentality Studies and the "reflexive government" thesis (Dean), 2/ the globalization perspective (Political Science and International Relations), which recognizes the effectiveness of the regime of "shared power" and global public-policy networks (Reinicke), and 3/ the organization approach to power in multistakeholder formations (Organization Studies and Management Studies), which prioritizes the dynamics of a consensus process (Gray).

By initiating a cross-disciplinary dialogue, this investigation thus applies an enriched, layered theoretical framework to the ICANN experience. This allows me to argue that ICANN, as a multistakeholder consensus-seeking entity, is a type of global public-policy network performing alternative public-policy making (that is, policy-making without government participation). In this sense, the U.S. government Internet DNS management privatization policy is seen, indeed, as a paradigmatic case of adjusting the hitherto centralized patterns and institutions of regulation to the shifting matrix of technology-society relationship.

As presented in Chapter 3, the investigation of ICANN's experience was deeply immersed in a four-year-long policy debate within the corporation, based on a range of sources: the flow of online contributions to a number of working groups and task forces, as preserved in the enormously rich ICANN archive; minutes of meetings of the Board and Domain-Name Supporting Organization (DNSO) Names Council; draft-policies and consensus-documents; testimonies and reports; transcripts of webcasting from ICANN's quarterly meetings around the world.

These first-order documents were organized in discussion units, based on the most significant (in terms of policy outcomes) and most controversial policies produced by the collaborative process. The discussion units were arranged in two large groups: substantive policies concerning the management of the Internet DNS, and organizational policies concerning ICANN's functioning. In the former group were: registrar accreditation policy (introducing competition to domain-name registration services); Uniform Dispute Resolution Policy (UDRP) (trademark protection in the DNS); famous trademarks protection; new generic top-level domains (gTLD) selection policy (expanding the DNS); internationalized domain names policy; and security and stability policy. In the latter group were: at-large membership participation and representation policy; policy on evolving and recognizing consensus in online discussions; and the evolution and reform campaign.

The investigation of the ICANN case begins in Chapter 4 with presenting the Internet DNS in three dimensions - technical, political-economic, and historical - in order to understand the complexities of the policy issues that ICANN was mandated to resolve

and the strategic capability of some stakeholders to influence the pace and direction of the policymaking process (the ccTLD operators and the technical cadre, for instance).

On the technical and economic levels, the combination of a number of factors contributed to the endowment of the domain name identifiers with economic value and the emergence of property-right allocation conflicts. While I accept the interpretation (Mueller, 2002) of ICANN's mandate as designing a new international regime for the governance of a common pool resource by excluding those political actors who traditionally were responsible for the preservation and effective management of the global commons, I argue that the lack of clear understanding of the domain-name space property characteristics (public good/utility vs. common pool resource) instigated the conflicts over the scope of ICANN's mandate.

The historical analysis of the evolution of the DNS (1983 – 1998), as a key layer of the Internet's architecture, reveals the process of gradual blurring of authority over the Internet root[5], with the distribution of operational and policymaking functions to a number of key technical cadre players. At the same time, it is concluded in Chapter 4 that the precommercial stage in the Internet's development incubated such defining components of the ICANN-led experiment in governance as: the issue area of a new regime for governance of the access and use of a common pool resource; two major stakeholder groups, namely a consolidated Internet technical elite and a large Internet user group at universities and schools; and the cultural conventions of a new regime of

[5] The term "Internet root" refers to the unnamed space at the top of the domain-name hierarchy or to its authoritative reference point, and is represented as ".".

governance based on the informal manner of research collaboration in an international community of experts.

Yet, the U.S. government entered the highly-contested DNS governance field only when the international Internet technical community and some intergovernmental standard organizations made an attempt to assert authority over the management of the Internet root in 1996. Based on a careful consideration of a cluster of then-contemporary political factors, I argue that the policy approach selected by the U.S. government to intervene in the Internet domain-name controversies (the trademark owners requirement of property-right protection) and in the policymaking authority appropriation attempts was embedded in its long-term foreign trade politics and was conditioned by the fluctuating U.S. and EU negotiations over trade-barriers and protection measures.

Overall, the U.S. government policy of privatizing the Internet's DNS management is interpreted in this thesis as an exemplary case of projecting neoliberal values onto the emerging global e-commerce regime, promoting a particular model of global governance as an alternative to the "industrial age" international order, and conceptualizing emerging global communications issues as commercial problems in need of market and trade regulation.

I argue further that the new regulatory regime is a continuation of both long-term U.S. neoliberal politics in foreign trade (free flow of information, no taxation, privatization, deregulation), and the politics of assimilation of a new global communication network into American foreign-trade politics; hence, my claim that 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 U.S.' G7 trade partners (see Mueller, 2002).

The argument that it was of vital importance to the U.S. 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, continues in the following four chapters with the detailed examination of the ICANN process in its formative years (1998 – 2002).

Three distinct lines of development provide the structure for this part of the thesis: 1/ establishing ICANN as a legitimate source of control over the Internet root (Chapter 5); 2/ implementing the U.S. government White Paper model of a multistakeholder collaborative consensus entity (Chapter 6); and 3/ developing substantive policies for the DNS management (Chapter 7). By recreating the chronological process and focusing on its power dynamics it was concluded that, instead of creating policies by generating consensus from diverse and proportionally represented stakeholders, ICANN functioned more as a trusteeship organization. Instead of mediating a bottom-up consensus building, the ICANN Management and the Board were steering a centralized top-down decision-making process.

In a fascinating power struggle among key stakeholders over recognizing ICANN's policymaking authority, the regulatory regime for the management of the global commons was established (i.e. a competitive domain-name registration market was created and trademark property rights were extended to Cyberspace), and the level of centralization of the new regime was negotiated (global vs. local policymaking as debated by the RIR operators and ccTLD managers).

Nonetheless, in the same process, the largely acclaimed participatory democracy model of self-governance was compromised as the at-large Internet users were not allowed into the ICANN representational structure. In addition, non-commercial domain-name holders' interests were fighting an uneven battle with the broadly-represented commercial constituencies in the DNSO; the cultural dominance of the U.S. and European participants was undermining the principle of geographic diversity; and the open-access working-group consensus model was discarded as inefficient.

In analyzing the stakeholder discourse in ICANN, two competing ideologies about the prerogatives of the corporation were detected in Chapter 6. On the one hand, there was the purely technocratic view of the ICANN Management of the Internet DNS, which was focused exclusively on efficiency and effectiveness and gravitated towards defining the ICANN mandate in narrow technical terms: maintaining the stability of the Internet. The protagonists of this view tended to overlook the importance of the political process by which the medium's architecture was shaped, and were not sincerely interested in the social implications of ICANN policy.

On the other hand, the champions of the bottom-up consensus view, who were all in opposition to the Interim Board and the Staff, asserted that ICANN's actions had public policy content. In that view, openness and inclusion via user representation were as important principles of governance as effectiveness and efficiency.

Considering these conflicting ideologies, and informed by previous research on multistakeholder-consensus processes, I argue that the consensus process in ICANN was doomed to failure not because of the irreconcilable stakeholder positions on property rights issues, as it is often claimed (see Mueller, 2002; Weinberg, 2000), but due to the

lack of some necessary preliminary conditions (i.e. consensus on ICANN's mandate and the criteria for reaching consensus, as well as financial stability and a balanced constituency representative structure), and the Management's reluctance to assume the role of a mediator in the otherwise prolonged and not so fruitful discussion process in the online working groups.

It is concluded from the analysis of the above dynamics that, by allowing the process to divert from the innovative stakeholder-consensus-building formula and slip back to traditional top-down policymaking, the power holders in ICANN compromised the very idea of self-governance and, virtually, invited the world governments and international organizations to take over the policy-legitimizing role that an at-large membership and the consensus-reaching process were supposed to play.

The search for ICANN's identity, which inspired the evolution and reform campaign in 2002, is analyzed in Chapter 8. This search concluded with shifting the decision-making authority towards the top, and moving away from the White Paper model of an all-inclusive collaborative process. Ultimately, ICANN was redefined according to the administrative philosophy of efficiency as a limited-mandate technical coordination entity, functioning as a public-private partnership on a decision-making principle involving a more empowered Board and Management as well as public consultations instead of bottom-up consensus building. The current investigation concludes with the observation that, although ICANN 2.0 (in the participants' jargon) still claimed a resemblance to the original hybrid postmodern institutional model, it differed from it in the diminished scope of stakeholder participation (the criterion of

"informed participation" was introduced), and in its substitution of public consultation for consensus-building.

The complex theoretical approach to power that was applied to the investigation of the ICANN case enabled better understanding of a global public policy network as a network of interdependencies and a power-production network, as discussed in Chapter 9. It is argued there that, as well as a power-sharing entity, a collaborative formation (such as ICANN) generates transformative social impulses and develops social transformative capacity. Thus, along with the establishment of a global regulatory regime for a common pool resource, the closing of the participatory gap, developing and disseminating knowledge, and placing issues on the global agenda (Reinicke and Dang, 2000), ICANN has produced long-lasting intangible outcomes such as the dissemination of norms and values characteristic of the North-American Internet technical community, and the enlargement of a global network of Internet standard-development stakeholders by involving the at-large and business users.

Thus, it is concluded in the thesis that ICANN 1.0 can be credited with providing a major reference point for the current heated global Internet governance debate, which has been boiling under the United Nations World Summit on the Information Society (WSIS) umbrella since 2003.

Inspired and organized by the ITU, which is perceived in ICANN circles and among the American scholars in particular, as the arch-rival of the corporation, the first phase of the Summit (held in Geneva, Switzerland in December 2003) recognized the importance of the Internet as a central element of the infrastructure of the emerging

information society and established principles to guide the management of the Internet.[6] Interestingly, the same policymaking principles that constituted the foundation of the ICANN experiment and had been promoted by the U.S. government were embraced by the heads of governments participating in the Summit.[7] The Secretary-General of the United Nations was asked to set up a working group on Internet governance (WGIG) to investigate and make proposals for action by 2005.[8] The ICANN-knit network of concerned and active civil society representatives, many of whom were veterans of the DNS-policy debates in the mid-1990s, provided a pool of knowledgeable participants in the WGIG online and face-to-face discussions.

Yet, as the main goal of the UN/ITU initiative was to reestablish the principle of intergovernmental responsibility in the global communications arena, although recognizing the need for broader participation by the private sector and civil society, ICANN's experience in conducting a self-regulation consensus process did not receive much appreciation at this stage. It was suggested that ICANN be incorporated in an all-encompassing international Internet governance regime.[9]

Nevertheless, in the process of formulating principles for global Internet governance (2004 – 2005), the WGIG considered the "lessons learned" from the ICANN

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[6] See WSIS. "Declaration of Principles. Building the Information Society: A Global Challenge in the New Millennium", 12 December 2003; http://www.itu.int/wsis/docs/geneva/official/dop.html.

[7] The "Declaration of Principles" states, for instance, that "[t]he management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations"; and "[p]olicies that create a favourable climate for stability, predictability and fair competition at all levels should be developed and implemented in a manner that not only attracts more private investment for ICT infrastructure development but also enables universal service obligations to be met in areas where traditional market conditions fail to work".

[8] The second phase of the Summit was due to take place in Tunis, Tunisia, in November 2005, only weeks after the submission of this thesis.

[9] Commenting on this scenario, Paul Twomey, ICANN President and CEO, expressed the concern "about the way in which the issues are being cast in the WSIS process and the confusion around some of these terms" (see Twomey's interview for *Domains.info* at the ICANN quarterly meeting in Rome, March 2004).

formative years (for instance, "multistakeholderism" was recognized as the principle of Internet governance in the WGIG Report, 2005).

In summary, it can be claimed that the present thesis provides a novel and original "reading" of the, arguably, most significant experiment in global communications governance in recent years, namely ICANN. In particular, the thesis 1/ develops and applies a complex cross-disciplinary theoretical matrix for investigating power dynamics in a multistakeholder collaborative consensus process; 2/ applies a critical process-oriented approach to the investigation, which focuses on actors, strategies, and outcomes; 3/ studies exhaustively both a diverse pool of archival material and structured participant testimonies; and 4/ contextualizes the case in technological, political-economic, and historical plans, emphasizing its significance in exemplifying the neoliberal governmentality of private sector self-governance and limited government participation.

Overall, the thesis contributes to the conceptualization of the 21st century governmentality of "shared power" among diverse stakeholders in global public-policy (GPP) networks. In view of the scarce analytical literature on the functioning of these hybrid formations, the present thesis proposes an original conceptualization of GPP networks as networks of interdependencies and power production, where transformative social energy is generated and accumulated. This, itself, constitutes a contribution to our understanding of social power and to the emerging field of global governance.

Finally, the thesis contributes to the current debate on Internet governance by formulating a number of "lessons learned" from the ICANN experience and suggesting a more differentiated approach where governance structures for the layered global network are concerned.

Chapter 1. Approaching ICANN as a network of interdependencies

ICANN was launched in late 1998 as an institutional form for alternative policy intervention in the transformation of the global digital network from a communicative to a commercial medium. Indeed, this policy intervention was called upon to settle competing values over the flow of information on the network. With the commercialization of the Internet in the early 1990s, how to govern Cyberspace acquired paramount significance. Such issues as protecting privacy and guaranteeing the security of online transactions gained priority on the agenda of international trade relations.

In view of the above concerns, the public debate on Internet regulability focused, in the mid-1990s, on the level of governmental intervention in "taming" the new medium, based on the experience of broadcasting and telecommunications governance and the alleged "unruliness" of the globally distributed network.

As we shall discuss later, the U.S. Internet DNS management privatization policy was conceived amidst this public discourse of limited governmental role in view of the original self-regulative regime of the medium. More importantly for the present thesis, in ICANN's formative years, the competing views in this discourse influenced the range of academic reflections on the newly established private corporation for the management of the DNS. While the multistakeholder collaborative model for policymaking foreseen with the creation of ICANN was almost universally acclaimed, its implementation was subjected to persistent criticism, because it was perceived as being curtailed by those stakeholders who enjoyed structural supremacy and influence over the process.

The research platform of the present thesis is developed by taking into account the contextual (pre-ICANN) public discourse on Internet governance in the 1990s, and existing academic analyses of the ICANN case. In juxtaposition to previous analyses, I argue here that studying the power dynamics of the multistakeholder collaborative process is a research strategy, which enables a holistic view on the subject of investigation (actors, strategies, and outcomes), unravels the complex causality of the political outcomes, and, overall, provides a better understanding of the emergent Internet global public policy regime.

1.1. Inscribing ICANN in the Internet-governance debate

By the time the U.S. Administration began soliciting input on the Internet DNS management policy (1997), a lively public debate on the regulability of the new global medium had evolved, and at least four principal competing views had emerged. In this highly energized and ideologically charged discursive environment[10], the experiment with a hybrid institutional format was seen by many as holding the key to the Internet regulation debate itself and to the Internet's destiny as a global public network.

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[10] The broader public debate in the United States at the time was focused on the Clinton/Gore Administration's National Information Infrastructure (NII) project which was formulated in 1993. The project was framed as a strategy for enhancing the U.S. competitiveness in the Information Age (see Chapter 4.3.3). The public debate on the NII was conducted by the mainstream media along business, and not public-policy lines. As the communications scholar Robert McChesney cautioned, "the debate over communications policy is restricted to elites and those with serious financial stakes in the outcome. It does not reflect well on the caliber of U.S. participatory democracy". He concluded that "[t]he historical record of communication regulation indicates that... once the needs of corporations are given primacy, the public interest will invariably be pushed to the margins" (McChesney, 1996, 103 – 104).

1.1.1. The pro-government-involvement view

In the U.S.A., as the Internet was considered both an element of and the prototype of the National Information Infrastructure (NII)[11], the benefits of the wide-open use of the medium were framed mainly in economic and functional terms. For those concerned with protecting the public interest, it was of utmost importance to establish a democratic basis for the governmental project.

In 1994, in a report to the U.S. government Information Infrastructure Task Force ("Serving the Community: A Public Interest Vision of the National Information Infrastructure"), the Computer Professionals for Social Responsibility (CPSR)[12] expressed a number of concerns with the NII planning process.[13] More importantly, the report is representative of the anti-commercialization and pro-government-involvement attitudes of an important part of the Internet community.

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[11] See *Technology for America's Growth: A New Direction to Build Economic Strength*. Washington DC: The White House, February 1993, and U.S. Department of Commerce, NTIA *The National Information Infrastructure: Agenda for Action*, September 1993.

[12] The CPSR was one of the several non-profit, public interest organizations that actively participated in the ICANN debate later. In their understanding, the public interest equaled "a strong and unequivocal commitment to democratic principles". Noticing that the practice of democracy in the U.S.A. was eroding, they underscored that "the design and structure of the NII will have a profound effect on the future of democracy in America" (CPSR, 1994, 15).

[13] In fact, these were the concerns of Internet users at the time. Among them were: 1/ "the NII may fail to provide universal access" in terms of network connection availability, reasonable price structure, user training programs, and easy-to-use software tools; 2/ "a small number of companies may dominate [the physical infrastructure of] the network and exert undue influence on its design and operation"; 3/ the carriers that own the network may seek to control the content that flows through it; 4/ the NII design may be affected by the failure to understand that people use information networks primarily for communication with other people, and continue "to promote electronic consumerism"; 5/ the NII should "provide a vital public space" for communication and community building; 6/ "the NII may fail to protect individual privacy" (CPSR, 1994, 2 – 4).

The CPSR report stated, for instance, that "the NII cannot meet its public policy objectives without some combination of government initiative and regulation" (5).[14] In view of the specific ICANN debate later, "public vs. private" constituted a major battle line when who had the authority to make global policies was discussed.

The U.S. government was asked, though, to actively promote democratic decision-making when the NII design, operation, and use policies were developed. Later, the same requirements of openness and transparency, diverse representation and participation were imposed by the public-interest community on the ICANN process as its fundamental operational principles. Moreover, as shown further in this chapter, for critics and proponents alike, this set of principles served as a decisive standard when ICANN's legitimacy was assessed.

It was suggested, as well, that informal coordination of the Internet, which allowed for widespread participation in the process of running the network, was a function of the open and distributed architecture of the medium, supported by evolutionary, interoperable standards (the TCP/IP network protocol). Five years later, that same correlation would change the paradigm of thinking about the Internet, after the U.S. legal scholar Lawrence Lessig (1999) incorporated it into a full-fledged theory of the regulative power of the medium's architecture, and coined the phrase "code is law".

Most importantly for the present thesis, for the first time, a hybrid policy-making approach was recommended as most suitable for the NII, namely "participatory design"

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[14] "If the NII is left entirely to private enterprise, it may become nothing more than a vehicle for entertainment, finance, shopping, and advertising... it is only through government action that we will preserve a public-interest component of the NII beyond these commercial interests" (CPSR, 1994, 21).

(20). Anticipating a clash over the decision-making authority[15], the CPSR report proposed that users be involved "from the early design stages", because "individual users and their institutions had developed a sense of a strong involvement in the Internet's success". Thus, "the benefits of democratic input to design and policymaking" would be achieved "without sacrificing the technical advantages of consistency and elegance of design" (20). This proposal stemmed from the early Internet users' active participation in the administrative process, allowed by the distributed management and maintenance of the Internet.

1.1.2. The libertarian view of independence of Cyberspace

In the early Internet governance debate (1991 – 1996), the medium was described as "functioning anarchy" because of its decentralized architecture and distribution of power to the periphery and individual users.[16] Nicholas Negroponte, for instance, anchored his optimism for the future in "the empowering nature of being digital". He compared digital technology to "a natural force driving people into greater world harmony" (Negroponte, 1995, 230), and teased the industrial world order with the statement that "[l]ong before political harmony and long before the GATT talks can reach agreement on the tariff and trade of atoms..., bits will be borderless, stored and manipulated with absolutely no respect to geopolitical boundaries" (228).

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[15] The CPSR report (1994) stated that "[t]raditionally, technologists have argued that only a strong central vision can produce elegant, consistent, complete designs... they argue that technical design must be left to those who understand its complexities. Unfortunately this approach tends to create complex systems that can be understood only by the technical elite" (20).

[16] For a more detailed presentation of the "cyberspace libertarianism", see Spinello, 2002.

The metaphor of Cyberspace as the new frontier acquired omnipresence in the mainstream media and academic publications alike, signifying the user community's spirit of independence and individual power.

In an inspiring *Declaration of the Independence of Cyberspace* (February 8, 1996) John Perry Barlow addressed the governments of the industrial world by challenging their power to interfere in the virtual reality enabled by the Internet: "You claim there are problems among us that you need to solve... We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different".

In reality, the *Declaration* was a brave-face reaction to the growing perception of approaching governmental interference in the informal rules hitherto governing Cyberspace.[17]

In 1996, some national governments (i. e. Australia, Singapore, Indonesia, Malaysia, the Philippines, Thailand, Vietnam, Brunei)[18] began discussing how to effectively censor pornographic, racist, and hate content on the Internet. As governments rationalized their actions as protecting the children from exposure to harmful information, the term "Internet regulation" acquired the particular meaning of "censoring online content", inflicting concern among the libertarians. These concerns would be reiterated in the ICANN debate, as well, where some critics have cautioned against ICANN's power

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[17] The following excerpt from Barlow's *Declaration* is an illustration of that perception: the "obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world...".

[18] Singapore, for instance, introduced a law "Class License Scheme", requiring the nation's three Internet Service Providers (ISPs), political parties, and individuals with websites on politics and religion, and online newspapers to register with the government within 14 days of operation, and to block objectionable material.

to control the content of the root (Post, 1998; Mueller, 2002). Consequently, they later entered the UN WSIS debate as well.

The important thing is that, in the mid-1990s, the widely-held belief that government attempts to censor Internet-based communication were ineffective[19] because of the medium's ability to overcome restrictions by introducing new protocols or software, referred to the DNS management and the e-commerce regulation as well.

1.1.3. Lessig's "code-is-law" view: spelling out the myth of the ungovernable Internet

Lawrence Lessig's book *Code and Other Laws of Cyberspace* (1999) brought to the public debate the revelation that, despite the ability of online communication to escape the restraints of geographic boundaries, behavior in cyberspace was regulated by the restraints of the architectural code, the software which permitted and prohibited at the same time.[20]

Lessig's goal was to spell out the myth that "the Net has a nature, and that its nature is liberty". On the contrary, Lessig claimed that "[a]s the Net is being remade to fit

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[19] The Internet regulation public debate in the mid-1990s was based on the presumption that network communication is inherently different from broadcast communication and, thus, should not be regulated in the same way. Because of the distributed power to the periphery of the Net, there was a virtual consensus that 1/ the ISPs, as transmitters of content from the end users to the global Net, could not monitor, control or block the information their customers send or receive; and 2/ children could be most effectively protected by developing a rating system, self-implemented by the producers of content (potentially, every Internet user), and installing filtering (access control) software on the users' computers.

[20] The significance of Lessig's monograph for the maturation of the Internet governance debate is underscored in the following excerpt from one of the numerous favorable reviews that the book received: "for the foreseeable future, Lessig's book will be the starting point for all discussions of Internet governance. It has created an entirely new platform for such discussions, a kind of ground zero for thinking about the hard issues of rights and sovereignty of jurisdiction and constitution. And it has a great advantage over the ideas of the previous thinkers such as Barlow and Negroponte because it actually gives us somewhere to go" (Coyle, 2000).

the demands of commerce, architectures are being added to make it serve commerce more effectively. Regulability will be a by-product of these changes" (30).

On this basis, Lessig developed the argument that certain codes in Cyberspace enable stronger control over the users' behavior because of the architecture they create. What he had in mind were those protocols that were used at the application layer, such as browsers, operating systems, encryption modules, etc., and not the TCP/IP protocols, which enable the access to the Net and interoperability. Yet, the ICANN experience, which is presented later in the thesis, demonstrates that open access to the Net can also be targeted by trademark interests, which insisted on filtering the registered domain names on the basis of a "famous trademarks" list and demanding the ISPs to apply this technology of exclusion.

Concluding from this that as a modality of regulation, as the regulator of Cyberspace, code was politically relevant, Lessig touched on the issue of "competing authorities" in Cyberspace. If control over code is power, he reasoned, "code writers are increasingly lawmakers" (60). But "who controls the code writers", he asked.

Not surprisingly, considering both Lessig's training in Constitutional Law, and the U.S. government's legacy in subsidizing the development of the Internet, the answer was – the government: "government has a range of tools that it uses to regulate. Cyberspace expands that range. The code of cyberspace is becoming just another tool of state regulation. Indirectly, by regulating code writing, the government can achieve regulatory ends..." (99). Nevertheless, Lessig believed that "some values can be achieved only if government intervenes", because, otherwise, "[t]he invisible hand will change it [the code] in a predictable way" (109).

In this respect, his interpretation of U.S. government privatization of Internet DNS management was that the policymaking was vested in an independent agency that is "wholly outside the democratic process". For him, this was an act of abandoning the collective values that "ought to regulate private action" (219).

1.1.4. Self-regulation: the third way

In the second half of the 1990s, the realization of the rule-establishing capacity of Internet technical standards focused the public debate on the role of the invisible but powerful technical cadre and the efficiency of its informal standard-setting regime.

Already in 1995, Anthony M. Rutkowski praised the Internet standards' development process as "by far the best in the business" (Rutkowski, 1995, 596). Anticipating a paradigm shift in the global standards-making regime, Rutkowski was adamant about the prevailing Internet standards-making regime as a model: "More than just a standards process, it is a distributed collaboration and innovation engine… its very uniqueness, however, suggests that it may not be easily applied to existing standards-making organizations and their proceedings" (597). Among the unique features of this process, Rutkowski underscored individual as opposed to organizational open participation, minimum "institutional ossification" due to constant turnover of working groups, network-based activities, creating the right culture of informality, network access, and the presence of a large peer group. On this basis, he suggested that a principal role of

government in this environment should be "simply to follow and understand what is occurring both domestically and worldwide" (600).[21]

Around the same time, the domain-name wars loomed large and a number of U.S. legal scholars got involved in the debate on developing a legal regime for Cyberspace. In general, they accepted the idea that the traditional sovereignty paradigm was disintegrating and, hence, applying laws based on geographical boundaries was not a feasible strategy.

A. Michel Froomkin, for instance, was convinced that content control was impossible on the Internet: "any effort to censor the Internet organized at the national level (or below) is likely to fail" (Froomkin, 1997, 141). The reason, according to Froomkin, was that "the multinational nature of the Internet makes it possible for users to engage in *regulatory arbitrage* - to choose to evade disliked domestic regulations by communicating/transacting under regulatory regimes with different rules" (142). His sanguine conclusion was that the Internet would promote "liberal democratic values of openness and freedom and not... detract from modern states' legitimate regulatory powers" (155).

In the same vein, David Johnson and David Post (1997) proposed, as a central principle for the Net, that "territorially local claims to restrict online transactions in ways unrelated to vital and localized interests of a territorial government should be resisted" (27). Specifically, they envisioned "new law-making institutions" to administer the

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[21] Milton Mueller (2002) comments that Rutkowski, in the early 1990s, as an American adviser to the ITU Secretary-General, "wanted to bring the Internet activity into the international standards community" by convincing the ITU to recognize the Internet community as "a major community of interest and a significant standards making forum with which liaison is required" (95). In 1992, when the Internet Society (ISOC) was formed, Rutkowski was made its executive director. Later, he became a consultant for Network Solutions (NSI).

domain-name space and they designated the community of online users and service-providers to develop such a self-governance system (22). Their prognosis was that "[t]he rise of responsible lawmaking institutions within cyberspace... will weigh heavily against arguments that would claim that the Net is 'lawless' and thus tie regulation of online trade to physical jurisdictions" (23). In conclusion, the authors wrote that "for online activities that minimally impact the vital interests of sovereigns, the self-regulating structures of cyberspace seem better suited than local authorities to deal with the Net-related legal issues" (24).

Overall, the complexities of the emerging regulative regime for the Internet suggested that governments should keep to the sidelines in the process, and the new institutional entities should draw on the existing expert collaborative efforts that had proved their efficiency, and also on the exclusive culture of openness and self-regulation.

In the above-sketched intellectual environment, the U.S. government initiated its Internet DNS management privatization policy by conducting public consultations, which, ultimately, led to the private-regime model as presented in its Green (January 1998) and White (June 1998) Papers.

1.2. ICANN under the academic magnifying glass

Academic reflections on ICANN appeared almost simultaneously with the inauguration of the private corporation (October 1998).[22] Facilitated by the open-participation and consultation format that the U.S. government selected for its

[22] Arguably, the U.S. legal scholar David Post provided one of the first attempts to grasp ICANN's identity as an institutional innovation by suggesting that the inauguration of ICANN marked the precise moment of institutionalization of the Internet governance regime (see Post, November 1998).

privatization policy, a number of U.S. social scientists[23] began scrutinizing the ICANN organization-building and policymaking process.

These were scholars who participated in the ICANN process (some of them had been involved in the earlier NII-related debate), and, thus, benefited from the rather fast pace of learning about Internet addressing technology, its historical development, and stakeholder interests.[24]

These were also scholars who were predominantly engaged in the Legal Studies field, and understandably so, for the original ICANN agenda consisted in resolving property-right issues. Consequently, the early academic debate on ICANN focused intensely on ICANN's legitimacy and authority[25] and on the changes in international intellectual-property law that the World Intellectual Property Organization (WIPO) induced and ICANN implemented through its Uniform Dispute Resolution Policy (UDRP).[26]

The interest of these authors was divided between the power delegated to ICANN to create a competitive domain name registration market and regulate it, and the implementation of the ICANN model of a stakeholder collaborative process to develop consensus-supported policies.

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[23] With few exceptions (e.g. Wolfgang Kleinwachter, Marc Holitscher) the participation of non-North-American scholars was constrained by such cultural factors as the exclusive use of English language in the online and face-to-face deliberations, and the inscription of ICANN, as a policymaking body, in the U.S.-specific legal environment.

[24] This is an observation shared by many of the interviewees for the present thesis, who all were long-term participants in ICANN.

[25] Some of the most prominent authors in this field were: Froomkin, the cofounder of the *ICANNWatch* website (2000; 2002; Froomkin and Lemley, 2003); Weinberg, the cochairman of the Working Group-C on New gTLDs (2000).

[26] On this issue, the following scholars have published articles: Froomkin (February 2001; 2002); Mueller ("Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy", *The Information Society* 17); Geist (August 2001); Stewart (May 2001); Davis (2002); Heifer et al. (2001).

Adopting, in general, a critical stance towards the realization of the ICANN project and the management of the corporation, these scholars-turned-activists ultimately produced the first account of the battles leading to the creation of ICANN and characterizing the corporation's functioning in its formative years. This account was based on personal observations, analyses of limited-access data and documents, and personal communication with important ICANN players.[27]

From the diverse landscape of publications on ICANN[28], I present here only those that treat ICANN as an institutional innovation and are concerned with the realization of the bottom-up consensus process. A number of insights that were reached in these publications have helped me develop my critical approach towards the case, and have suggested the primary significance of the power matrix in which ICANN was conceived and immersed in its formative years.

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[27] It should be noted here that, because of their deep involvement with the deliberations in ICANN, some of these U.S. scholars have developed rather rigid critical views on ICANN's practices, often based on a suspicion of conspiracy. Yet, after conducting some quantitative research on the effectiveness of the ICANN-produced UDRP, Mueller and Geist had to retract from their initial positions of total negation and recognize the merits of this approach to provide the intellectual-property owners with a faster and cheaper dispute-resolution mechanism. Mueller, for instance, wrote in 2000: "On the whole, the UDRP criteria for resolving domain name disputes have proven to be robust and fair. If applied properly, the policy serves as an effective remedy against abusive registrations while preventing overreaching by trademark holders. Although a significant number of bad decisions have come out of the process, the worst of them clearly violate or ignore one or more of the UDRP's decision criteria. The language of the UDRP is sound" (November 2000). Geist reported, as well, that, in less than two years, the UDRP had resolved over 3000 disputes involving more than 6000 domain names (2001). Nonetheless, the consistent assault on ICANN's authority, legitimacy, and fair policymaking by credible U.S. scholars has established a pattern of interpreting the ICANN experiment as a failure. For the next generation ICANN students, the privatization of the Internet DNS management under the ICANN formula constituted a failure (see Palfrey, December 2003), because it was perceived that the U.S. government's policy resulted in an authoritative regulative regime functioning against the interests of the Internet end users and the medium's innovation.

[28] The ICANN case has been studied, as well, in several Masters and Doctoral Theses, which, despite their contributions to the intellectual quest for identifying the new regulative regime, have not had significant influence on the public debate (see Jackson, 1998; McTaggart, 1999; Pare, 2000; Brophy, 2002).

1.2.1. ICANN as an institutional innovation: debating the causative factors

Initially, there was a virtual consensus among the scholars examining the U.S. government privatization of the Internet DNS management on the exceptional significance of the case (see, for instance, Post, 1999; Holitscher, 1999; Mueller, 2000, 2002; Kleinwachter, 2000). For observers sympathetic to ICANN's cause, the policy was considered "paradigmatic... for private sector governance in the Information Age" and ICANN was seen as exemplifying "an amazing novelty in international affairs: a private international organization that acts on behalf of the public trust, but stands outside of government control and is responsible for the management of a crucial global public good, that is the unique Internet addresses (IP-numbers)" (Holitscher, 1999).

Depending on their own research interests and experiences, authors interpreted differently the causative factors for the institutional-design choice. For many of them, the "open governance" process in the private corporation was simply governmental recognition of the virtues of the pre-commercial Internet informal regulative regime.

Thus, drawing on scholarship of social norms, one of the earliest publications on the emerging "law of Cyberspace" ("Developments in the Law: The Law of Cyberspace", editorial, *Harvard Law Review*, 1999) contended that Internet norms of open participation, consensus building, and grassroots coordination (bottom-up, consensus-driven, trust-based governance) have served key functions in the construction of the new regime of domain name governance: "[t]hrough the publication of the White Paper, the U.S. government codified these nebulous principles and contributed to the birth of a written history of Internet governance" (4). Implicit in this analysis is the assumption that

Internet norms emanated from the technology's globally distributed and decentralized regulative format. Idealizing the intrinsic mechanism of institutionalization, the authors claim that "[t]he steps leading to the creation of ICANN illustrate a continuing commitment to the values of openness, trust, and grassroots coordination and portend that, even in the face of an expanding and commercializing Internet, governance structures that respect indigenous norms and customs will prove more successful" (8-9). According to this publication, such a new management regime would have the ability to foster a common code of behavior for an increasingly diverse Internet, and help unify a variety of Internet interests.

A variation of the same "technology-driven-institutional-change" theme is the argument that decisions on governance reflect the dominant technology-related trends. Thus, Friedlander and Cooper (2000) suggested that "[a]s more and more hitherto independent technologies... converge on what may be loosely considered 'the Internet', we find ourselves having to come to terms with multiple and divergent traditions of use, management, and oversight at home and abroad" (3). In terms of Internet regulation, the authors advised that "[a] nuanced and layered [regulative] framework... is more appropriate to the heterogeneous environments and applications that the technologies support and may potentially support than a single, integrated entity" (3).

On the other hand, for communications scholar Milton Mueller (2000), the Internet's "ability to create new resources [forms of value] serves as the catalyst of fairly rapid and disruptive institutional change" (1). Drawing on concepts of institutional change, Mueller investigated the DNS governance case as exemplary of technology's ability to serve as "the driver of institutional innovation" (1) through "opening" new

resources for exploitation. Employing the political economy conceptual framework, which links institutional change to the emergence of resources created by new technologies, in later publications, Mueller (2002) set his analysis on two postulates: first, "the battles over the root fall unambiguously into a specific class of social phenomena: the formation of property rights" (58), and, second, "[p]roperty rights assign decision-making authority over resources to individuals or groups" (60).

Finally, the Swiss International Studies scholar, Marc Holitscher (1999) emphasized that, by exerting "soft power" on foreign governments (in this case the term referred to "U.S. superiority with regard to the Internet infrastructure as the U.S. controlled the Internet backbones"), the U.S. was able to impose an "American style regulation". In effect, authority over the DNS management was transferred to the private sector and national governments were bypassed by granting them only advisory status in ICANN.

It can be observed that the above-presented attempts to interpret the shifting regime of governance in the global communications field have exhibited a tendency to isolate a single factor from the otherwise complex communication technology-society relationship and endow it with exclusive transformative potential.

On the contrary, following the critical tradition in Communication Studies, the present thesis aims at establishing a multirelational social matrix for the ICANN case. Thus, I further argue that U.S. government privatization policy in the Internet DNS was impelled by a number of interrelated political and technological factors. The organizational format of ICANN, itself, reflected both the legacy of informal Internet

regulation and the contemporary neoliberal governmentality of collaborative private-sector-led self-regulation (the "reflexive government" paradigm – see Dean, 1999).

1.2.2. The consensus process: debating ICANN's identity

As I argue later in the thesis, ICANN was subjected to two contradicting sets of expectations, or two different normative philosophies, which accounted for its hybrid institutional makeup and much of the tension in conducting a proper, although time-consuming, bottom-up process.

On the one hand, there was the requirement of efficiency that the U.S. government imposed on ICANN through its Memorandum of Understanding (MoU) (November 25, 1998). In two years, till October 2000, ICANN was requested to fulfill an ambitious policymaking agenda as a condition for the complete transfer of authority over Internet DNS management from the DoC to the corporation. On the other hand, to resolve the issue of its legitimacy, the DoC prescribed an impressively inclusive model of alternative (without government involvement) policymaking process. In effect, it was expected that the dynamics of the informal standard-setting regime of the pre-commercial Internet, which had involved a limited number of technical experts and savvy users, could be easily transplanted to the politically charged area of resolving property rights issues.

This hybrid institutional design of ICANN has prompted a number of scholars to search for a proper metrics (measures used to indicate progress or achievement) when analyzing the level of success of ICANN. The legal scholar Dan Hunter (2003), for instance, noted that "[t]he dual character of ICANN leads to alternative views of the

kinds of political commitments we should expect [from ICANN]". And he assigns these alternative views to, first, Tamar Frankel - that ICANN needs to conform to corporate governance expectations, and, second, to Michael Froomkin and Jonathan Weinberg - that ICANN should comply with the usual democratic expectations for governmental institutions (1174).

I would argue, though, that Hunter, along with the ICANN critics at large, misses the most obvious, third, interpretation of ICANN's identity, namely, as a multistakeholder collaborative consensus-building formation, which was the one tailored specifically for ICANN in the U.S. government's White Paper. Without understanding the creative potential and the process dynamics of this alternative policymaking regime, one cannot correctly detect the misgivings in managing such a complex social network as ICANN. The best result that may be expected when such a fuzzy focus is applied to ICANN is to come to the conclusion that the experiment has failed.[29]

I argue, though, that the consistent strong criticism towards ICANN, when it was made, of course, from objective research foundations, has applied inadequate criteria of success to the experiment. The next few illustrations exemplify this trend in the ICANN-related literature.

- The legal scholars Jonathan Weinberg (2000) and A. Michael Froomkin (2000) applied the principles of Administrative Law and Political Philosophy with the result that they discarded the claim that ICANN was a legitimate governmental agency, because of its deficiency in democratic mechanisms ("checks-and-

[29] John Palfrey (August 2003), the Executive Director of the Berkman Center for Internet and Society, for instance, concludes, on the basis of studying the comments in the ICANN online Public Forum, that "ICANN's experimentation in running a representative and open corporate decision-making process has largely failed" (1).

balances", fair representation, and efficient public participation). Nevertheless, Weinberg (July 2001) did go a step further in attempting to crack the ICANN-identity puzzle by comparing the "prototype's" (the Internet Engineering Task Force - IETF) features with those of ICANN. He found that ICANN differed from the IETF "in the nature of the questions it addresses" (18) (political vs. purely technical-standard-setting), and in the scope of the participants – a "relatively small and homogenous" community, "bound together by shared values and professional norms" (26) vs. a universe of diverse stakeholders. Consequently, in his view, an IETF-like consensus process could not be expected from ICANN. Rather, improving its representative democracy mechanisms (i.e. returning to the original Board make-up of half-experts and half-at-large representatives) would resolve the issue with ICANN's legitimacy.

- The corporate management scholar and law professor Tamar Frankel (2002) approached ICANN as a corporate entity, rather than a governmental agency, which led to applying a different set of metrics to its process. Although she was concerned with the same issue of enhancing ICANN's legitimacy, Frankel focused on the way functions and powers were defined, and accountability and oversight established. Her claim was that "unclear power boundaries allowed ICANN's Management and board to assert broad discretion... and... a lower level of accounting" (1), which, overall, made it difficult to evaluate ICANN's performance. Nonetheless, by applying a corporate governance understanding of accountability and oversight, Frankel advanced the idea that ICANN's functions should be divided into making 1/ policy and 2/ operational decisions, which

would lead to designing specific processes for each of them. Accordingly, the Staff and Board, which had so far demonstrated their incapacity to conduct a consensus policymaking process, would be divided into two separate expert groups: "The new staff should not be composed of legal litigators but of lawyers and public officers with experience in government and public policy accountability" (15).

Without getting into any further details, I have to note here that Frankel's report was based on the conviction that ICANN functioned as a trusteeship organization, and, thus, the dynamics of a multistakeholder collaborative formation as defined in Interorganizational Studies and Management Studies were irrelevant. Accordingly, the legitimacy of the process was sought in applying corporate control mechanisms, and not in developing consensus-reaching process, as it was envisioned in the original ICANN model.

The "consensus policy regime" is considered, though, as being central to ICANN's legitimacy by Johnson, Post and Crawford.[30] Their collaborative publication (2003) is based on the recognition that ICANN has no statutory authority and, in addition, that it cannot claim to be a representative democracy. To compensate for the lack of power to enforce its rules, ICANN was required by the DoC to include in its contracts with registries and registrars[31] the obligation to demonstrate that any mandatory naming

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[30] See Johnson and Crawford, 2000 (three articles); Post et al., July 21, 1999; Post, August 20, 1999; Johnson, Post and Crawford, June 2003.

[31] According to the ICANN "Registrar Accreditation Agreement" (17 May 2001), a registry is a person or an organization authorized by IANA/ICANN to operate one or more registry databases – "to give out domain names under their top level domain to those who ask for them and make the database of domain name registrations available to the world at large". A domain name registrar is "a person or an entity that contracts with registered name holders and with a registry operator and collects registration data about the registered name holders and submits registration information for entry in the registry database".

policy had emerged from bottom-up processes involving all affected parties. Thus, the authors conclude, "[i]n a sense, the consensus policy theory provides a real 'social contract' and contractually binding 'consent of the governed'" (1133).

Importantly for my argument in this thesis, the authors identify certain leadership deficiencies as the causes of the failed attempts to create consensus policies in ICANN. Among them they outline the resistance of the Management to "publicly exert leadership in calling for the creation of consensus policies and running the process" (1131), which concurs with the current thesis' conclusions.

In light of the later UN WSIS Internet Governance debate (still unfolding as this was being written), the above-presented differing approaches to analyzing ICANN's institutional belonging and process deficiencies have not only evaluative, but also instructive significance. If we find some answers to the question "why did ICANN fail to achieve the envisioned model of globally representative policymaking through a multistakeholder consensus process", we could gain better understanding of the complexities of interaction in a global public-policy network.

As presented next, it is the aim of my investigation of the ICANN case to untangle the multitude of stakeholder interdependencies, to study the dynamics of "shared power" policymaking, and to suggest some long-term, often intangible, outcomes from ICANN's stormy formative years. The latter could have particular significance for the emerging global Internet governance regime.

1.3. Constituting the research platform

For those who have followed the complicated policymaking in ICANN, it is apparent that ICANN's experience, particularly in its formative years, was conditioned upon a matrix of pre-existing interdependencies.

Thus, as it is discussed further, the U.S. government's political project of promoting the Internet as the new global digital marketplace relied on resolving pending trademark protection issues, while securing the Government's authority over the root. The Internet technical cadre's aspirations aimed at complete delegation of governance authority by the U.S. government and this, in turn, was a function of promptly fulfilling the ICANN mandate, which, itself, required functioning contractual relations with a large number of stakeholders. On their part, to get to the lucrative domain-name registration market (especially, in the *.com* TLD), the registries and registrars had to accept ICANN's regulatory mandate, due to the DNS single-root architecture.[32] Moreover, in its solitude as the most powerful, and, arguably, the most despised player in the orbit of ICANN, Network Solutions (NSI)[33] had to succumb to the U.S. DoC pressure and get into

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[32] As explained in an ICANN policy document (ICANN. "A Unique, Authoritative Root for the DNS", 9 July 2001), "[t]he DNS is a globally distributed database of domain name (and other) information. One of its core design goals is that it reliably provides the same answers to the same queries from any source on the public Internet, thereby supporting predictable routing of Internet communications. Achievement of that design goal requires a globally unique public name space derived from a single, globally unique DNS root... Because of the uniqueness requirement, the content and operation of the DNS root must be coordinated by a central entity".

[33] Network Solutions, Inc. was the first private organization to register Internet domain names in *.com*, *.org*, and *.net* TLDs. After ICANN's creation, and under the U.S. DoC pressure, it began to develop interfaces to its business systems to accommodate multiple registrars. It still hosts the master database of registrations that all registrars use. In 2000, Network Solutions was acquired by VeriSign, Inc. In 2003, VeriSign sold its Web-related businesses (e-mail, websites, hosting and Web presence) to Phoenix, Arizona-based Pivotal Private Equity. VeriSign kept the registry database of *.com* and *.net* domain names and website authentication service, renaming it VeriSign Naming and Directory Services.

contractual relations with ICANN in order to preserve its competitive advantage in the demonopolized domain-name registration market.

On the international scene, U.S. trade partners agreed (after behind-closed-doors negotiations – see Chapter 4.3.3) to the experiment in global private corporation governance, without direct governmental involvement, because of the "soft power" exerted on them by the U.S. Administration. The ITU, itself, which was bypassed by the Internet DNS management privatization policy, kept the lines of communication open with ICANN and, ultimately, claimed a leadership position in the Internet governance field, as the WSIS process has demonstrated.

The realization of this multitude of interdependencies determined my decision to direct the investigation towards the flow of interaction, as institutionalized in the ICANN process, to the dynamics of policymaking, which could reveal the particular interests and strategies of influencing the policy outcomes.

While taking into consideration the revealing insights offered in previous analyses, I applied a different perspective to Internet DNS management privatization, which is considered more adequate for the ICANN experiment.

Multistakeholder consensus-based collaboration is, indeed, a novelty in the communications policy field. Yet, since the 1980s, scholars in Interorganizational and Management studies have conceptualized collaboration as a public policy approach that provides a viable democratic alternative for dealing with complex issues. So far, the interest has been in such areas as community development and empowerment, coordinated service provision, environmental issues, conflict resolution, health and social

policy development (see Huxham, 1996, 16). On this basis, a rich conceptual and methodological set of instruments has been developed.

Contrary to the previous investigations of Internet DNS privatization that have endowed one particular factor (i.e. technology or cyber-community norms) with the power to induce institutional innovations, the current thesis discerns a social trend in this instance of global stakeholder collaboration in the communications policy field. The term used to further designate this trend is "shared power", and the trend, itself, is interpreted as constitutive of a new regime of governmentality. Thus, instead of assuming pre-determined dynamics of Internet governance due to the medium's "essence" or mode of use, the thesis inscribes the case in a particular "historical specificity" (Slack, 1984) of shifting networks of force relationships in the realm of communication technologies.

The approach outlined in the thesis, in addition, brings the collaborative process (rather than the decisions it leads to) into focus by accentuating the productive potential of shared-power collaboration.

In this light, the task of detecting and mapping shared power dynamics in the Internet DNS policy-setting process is seen as being oriented towards the larger horizon of understanding Internet governance as part of the global public-policy domain.

To overcome the limitations of previous research, I investigated the conclusions and recommendations reached in Interorganizational and Management studies on the basis of the analyses of numerous local and national collaborative formations. It was illuminating to discover that, on the basis of realized and recognized interdependencies, stakeholders with otherwise irreconcilable interests were able to resolve complex

environmental issues, to design social programs, and to overcome labor disputes.[34] Therefore, although what is discussed matters, it is in the stakeholders' power to reach commonly accepted decisions when the process of negotiating positions is skillfully mediated and the expectations are realistic.

Initially, though, my interest in the ICANN case was provoked by a seeming contradiction: if collaboration is based on the stakeholders' agreement to conduct a consensus-oriented process, and, if all stakeholders participate in the deliberations as equals, how is the exercise of power possible? And, further, in such a shared power environment, what are the stakeholders' strategies for influencing the collaborative process and its outcomes?

To address the above-outlined research concerns, I constructed a cluster of questions, focused on the "shared power" dynamics in ICANN:

1/ Who were the stakeholders sharing power in the collaborative arrangement? How were their stakes perceived, articulated, and expressed during the collaborative process? What were the power strategies used to influence the outcomes of the process?

2/ How were the power dynamics both conditioned and constrained by the stakeholder configuration in ICANN: structural imbalances of representation, control over resources, global representation, cultural impediments to the participation, availability and openness of decision-making forums?

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[34] The same dynamic was observed in an environmental collaborative group, which I had the opportunity to investigate in 2000 – 2001. The Ontario industry-led multistakeholder group Pilot Emission Reduction Trading Project (PERT) comprised of representatives of the energy production sector, non-profit environmental groups, and the provincial government. It had self-mandated to evaluate the environmental and economic benefits of using emission-reduction trading as a tool to improve air quality, to design a trading system that is publicly acceptable, and to develop a pilot emission-reduction market and propose policy-decisions to the government (see Turcotte and Antonova, June 28, 2002). The first-hand observations were instrumental in developing the research platform for the ICANN case investigation.

3/ What was the governmental participation in ICANN? How was the role of "observers" respected by the governmental representatives?

4/ How effective was the participation of non-commercial representatives in the agenda-setting, strategizing, and consensus-achieving stages?

5/ Did the collaborative process in ICANN lead to such intangible outcomes as consensus, learning, and innovation, which exemplify the productive potential of a shared power regime?

6/ How was power both shared in and generated by ICANN?

7/ Overall, what is the ICANN experiment's significance for the emerging global Internet governance regime?

In short, while drawing on the merits of other investigations of the case, this thesis aims at overcoming their one-dimensionality, which leads to the reduction of the case's complexity. To achieve this goal, in the next chapter I inscribe the case in a multi-theoretical and conceptual framework, which is a feasible research strategy due to the choice of power (a fundamental Social Science category) as the key variable for observation. The theoretical framework that is developed in Chapter 2 then allows me to emphasize the productive potential of the shared-power collaborative process in ICANN by investigating the political and cultural long-term outcomes in relation to the discussed issues.

Chapter 2. Laying out the theoretical matrix: choices and expectations

If one man knew the whole truth, his predictions would always be correct;
but since all existing theories are incomplete and partly false,
it is better to bring together a variety of partial theories
to better approximate the whole truth.

Diesing, 1962 (179)

The current investigation is an exercise in unraveling "the history of the present" (Michel Foucault). Although focused on the rationalities and practices of policy-making for a particular medium (the Internet) by a particular entity (ICANN), it is, nevertheless, concerned with the emergence of an alternative multistakeholder collaborative regime of policy-making in the field of communication, which possesses a certain democratic potential, and is exemplified by Internet governance innovations.

Power is constituted in the present study as both the magnifying glass for the political process and the dominant concept capable of rendering intelligible the examined phenomena. The underlying reason for this methodological choice is the understanding that shifting social practices are constructed in and by historically specific matrices of power relations; hence, the need to focus on the deepest mechanisms of the political process when examining unstable practices and emerging governance strategies.[35]

[35] In constituting power as the focal variable in the interrogation of the collaborative process on Internet DNS governance, this thesis is influenced by the concerns of other scholars in Social Sciences. For instance, Jennifer D. Slack (1984) stated with regret that the success of the intervention she proposes "at the site of attempts to extend patent protection to computer programs... cannot be guaranteed", because her analysis

On the one hand, as a pervasive social dynamic, power animates the relationship of communication technologies and society. It is my conviction that the communicative process in general, as well as each of its constitutive elements (communication technology and policy among others), cannot and should not be studied apart from the historically-specific power matrix. On the other hand, as a key political-philosophy category, power "opens" the treasury of Social Science theories and concepts, thus allowing the investigator to selectively appropriate those constructs, which are able to serve the established goal.

For this thesis, power is conceptualized by employing three reference frameworks borrowed from Political Philosophy, Political Science and International Relations, and Organization Studies: 1/ postmodern ontology of power, which maps the contemporary rationalities of government; 2/ globalization perspective on power, which recognizes the effectiveness of a regime of "shared power", and 3/ organizational approach to power in multistakeholder formations, which investigates the dynamics of consensus practices. It will be demonstrated, next, how each of them provides building elements for the analytical construct guiding the investigation of the emergent governance regime of "shared power" in the communications field.

The argument developed in the present thesis that a new regime of governance is emerging in the communications field, which considers the medium's architectural characteristics, users' norms of behavior in Cyberspace, and the regulator's potential to exert "soft power", resonates with Foucault's postmodern genealogy of dominant

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"lacks an adequate theory of political power and of the nature of the politically effective relationships between the various fractions of the capitalist class" (147). Andreas Schedler (1997) observes, as well, that "[i]t is impossible to speak of politics and remain silent on power or authority. Most concepts of politics accordingly take this aspect to be its essential, defining quality" (8).

technologies of government. In this perspective, technologies (in their primary functionality as governance mechanisms) are the tangible effects of a complex of power/knowledge relationships as formed in specific historical conditions of possibility. Once technologies enter the mainstream of human practices, they articulate their semi-autonomy in rearranging important social relations – economic, political, and cultural.

This view resonates with the Critical Communication Studies' understanding of the dialectical relationship between communication technologies and society. In the latter, technologies are very much a part of the social structure. They are invented, developed, and used within it, although simultaneously maintaining relative autonomy within the particular social formation. Thus, technologies are neither "peripheral expressions of some central essence" nor "organizing principle of society" (Slack, 1984, 82). Their identity, as both cause and effect, is subject to historical specificity.

Developed by Raymond Williams (1973) in relation to television, and elaborated further by Jennifer Daryl Slack (1984), this approach studies a particular technology (its place, functions, and effects) in its proper social and political context. Consequently, it opens a space for policy intervention in the development, regulation, and marketing of a particular communication technology.

In light of this critical perspective, the present investigation "reads" the Internet DNS privatization policy, developed and implemented under the U.S. government leadership, as an instance of "technological policy intervention" (Slack) in the never-ending chain of the power/knowledge relationship.

2.1. Postmodern ontology of power: rationalities of government

In *Cyberpower. The Culture and Politics of Cyberspace and the Internet* (1999) Tim Jordan conceptualizes power, after Michel Foucault[36], in the following manner: "Power is the name applied to that which structures culture, politics and economics. Power has many forms and there are many theories of power, but each draws its relevance from the sense that power names the things that determine how a life may be lived" (1).

The above definition speaks a lot of the elusiveness of the term, the difficulty in grasping the phenomenon's essence. It testifies, as well, to the pronounced deviation of the Political Philosophy of the late 20th century from the conventional conceptualizations of political power in terms of the sovereign and legitimacy.

2.1.1. Modern theories of power: liberalism and Marxism

The control over political power as exercised in a society by a ruler or a government has been *the* essential problem of Western Political Philosophy from classical (Plato and Aristotle) to medieval, and, since the 17th century, humanistic schools of thought (Hobbes, Locke, Rousseau, Hegel, Mill, Tocqueville, Marx, Nietzsche,

[36] Tim Jordan's investigation of cyberpower (1999) is an enlightening application of Foucault's power theory, which interprets the category of power as generically linked to the matrix of force relations emerging in and around Cyberspace. In Jordan's understanding, there is a major power struggle taking place in Cyberspace and it is between the "grassroots", or individual members of "virtual communities", the avatars, and "the virtual elite" dominating the construction and regulation of the "informational space of flows" due to its scientific and technological expertise.

Weber, etc.).[37] Perceived as an immanent feature of any social formation, power has been used as a classifying indicator of political systems. Philosophers as early as Plato and Aristotle defined the basic forms of government according to the number of power holders and their use or abuse of power.

From the development of the ontological notion of political power, two conventional modern theories of power emerged, which relied on the following assumptions[38] (see Table 1):

Table 1: Conventional (modern) theories of power

Liberal (judicial) theory of power ("power as a right" model)	Marxist conception of power ("power as repression" model)
1/ Power is in the possession of every free-will individual as an original right, as a commodity. 2/ Power as an original right is given up in the establishment of sovereignty (political power) through a legal act (a cession or contract). 3/ The contract constitutes the matrix of the political power, which defines its limits.	1/ Power exists only in actions; it is neither given, nor exchanged, but rather exercised. 2/ Power operates in and through the life of civil society. 3/ Power's role is to maintain, simultaneously, the relations of production and class domination, which is rendered possible by the development of specific forms of the forces of production. 4/ Due to its economic and class

[37] For a useful comparative analysis of the conceptualization of political power in modern Western Political Philosophy (from Hobbes to Foucault), see Hindess (1996).

[38] The above presentation of the liberal and Marxist postulates in the theory of power is drawn from Foucault's "Two Lectures. Lecture One: 7 January 1976" (1980, 88 – 92).

4/ Whenever a so-constituted power over-extends itself beyond the terms of the contract, it risks becoming oppression. 5/ Power should be analyzed in terms of sovereignty and legitimacy.	functionality, power is a relation of force which represses (nature, the instincts, a class, individuals); power can be defined as an organ of repression. 5/ Power should be analyzed in terms of struggle, conflict, and war.

Reflecting, respectively, the normative horizons of individualism and collectivism, these two rationalities of power, nevertheless, share a common epistemology: first, power is perceived as "enhancing the capacities of those who possess it and, consequently, in so far as it impinges on other persons, as an imposition on the freedom of those persons" (Hindess, 1996, 96), and, second, there is a common focus on the State as being endowed with power or exercising power for particular economic gains, and, more generally, on institutions and the people who rule them. Consequently, theories or ideologies were developed, guided by these perspectives, to justify or legitimize the existence of the State.

Foucault (1980) underscored that one can find "an economism" as a common point between the liberal and Marxist conceptions of political power. In the "power as a right" model, "one is able to possess [power] like a commodity", which then is contractually exchanged in order for "sovereignty to be established" (88). In the "power as repression" model, "the historical *raison d'être* of political power is to be found in the economy" (89).

Ensuing from this common epistemology, which conceives of power as being "always in a subordinate position relative to the economy" and as "modeled upon the commodity", nation-state institutions have been established as the focus for political analysis and intervention (see Foucault, 1980, 88-89).

2.1.2. Foucault's theory of power: a shifting matrix of force relations

Departing decisively from these conventional theoretical approaches to power, in the late 1970s, Foucault developed his original view of power, articulated in postmodern terms[39]. According to one of Foucault's critics, he "almost singlehandedly... moved the discussion of that most elusive and illusive concept from its modern or state-centered understanding to a postmodern or decentered version" (Wolin, 1988, 179). Through Foucault's conceptual optics, a political power (sovereign) that rules on the basis of consent is simply one among a number of "rationalities of government", and "therefore needing to be accorded no special analytical privilege" (Hindess, 1996, 98). Foucault himself linked the "conditions of possibility" for such an analysis of the mechanics of power, which has had never been done before, to daily struggles at the grass roots level, after 1968, among those "whose fight was located in the fine meshes of the web of power", because "[t]his was where the concrete nature of power became visible" (Foucault, 1980, 116).

Foucault introduced "a whole new vocabulary into the discourse on power" (Krippendorff, 1995, 105). Already in his early works *Discipline and Punish: The Birth*

[39] For Foucault, "modernity is more significantly an attitude than an era" (Hoy, 1988, 14). In this sense, his challenge to the modern metanarratives of the history of knowledge can be called "postmodern". Foucault himself, though, denied that he is an "enemy of reason" (20).

of the Prison (1977) and *Power/Knowledge: Selected Interviews and Other Writings, 1972 – 1977* (1980), he focused on power emanating from the production of truth as a technique of government: "There can be no possible exercise of power without a certain economy of discourse of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth" (Foucault, 1980, 93). Yet, initially, as the sociologist Marc J. LaFountain (1989) notices, Foucault tended to conceptualize power in a way reminiscent of "the Enlightenment view (i.e., that power excludes, represses, censors, abstracts, masks, conceals, and silences)" (124) – "negative power".[40]

Later, in *The History of Sexuality* (1978), Foucault "dismissed the notion of power as a simple... relationship between master and slave or between oppressor and oppressed" (Krippendorff, 1995, 105), and suggested that it is "manifest[ed] instead in complex networks of relationships – including of institutions, of knowledge" - "positive power". In his words, "[w]hat makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says 'no', but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. *It needs to be considered as a productive network which runs through the whole social body, much more than a negative instance whose function is repression"* (Foucault, 1980, 119 – emphasis added).

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[40] Foucault himself acknowledged that, initially, he had accepted the traditional conception of power "as an essentially judicial mechanism... which prohibits, which refuses, and which has a whole range of negative effects: exclusion, rejection, denial, obstruction, occultation, etc." And further: "The case of the penal system convinced me that the question of power needed to be formulated not so much in terms of justice as in those of technology, of tactics and strategy..." (Foucault, 1980, 183 – 184).

For Foucault, power is omnipresent and should not be identified exclusively with institutions or mechanisms used to induce subservience. Because of its pervasiveness, this conception of power escapes the modern imagery of "center – periphery" and "ownership". Rather, power should be understood as a "multiplicity of force relations immanent in the sphere in which they operate and which constitute their organization...and...as the strategies in which they take effect" (Foucault, 1978, 92-93). As LaFountain summarizes Foucault's understanding of the concept, "[p]ower is a shifting matrix of force relations that come from nowhere in particular and are everywhere and exist only in their exercise and maneuvering" (LaFountain, 1989, 125).

The power/knowledge concept is central to Foucault's work. Contrary to the Enlightenment belief in a progressive accumulation of knowledge against the "unthought", where the pursuit of truth is largely independent of the social environment, as it relies on reason, Foucault established power as the environment, defining what is considered knowledge, and what the limits of the unthought are. He postulated a historical series of regimes of power/knowledge, and stated that knowledge arises out of a power complex: regimes of power define what counts as a meaningful utterance, what topics are to be investigated, how facts are to be produced. Equally, however, all regimes of power are constituted by discursive formations: regimes of knowledge define who does and who does not have the intellectual authority to decide issues, how information should be gathered about whom and by whom. Power and knowledge always imply one another: they interpenetrate within specific regimes that provide the modes of subjection, and also liberation, through which subjects constitute themselves.

Convinced that no theoretical system has ever managed to account for the question of power, and that power in the substantive sense (*le pouvoir*) does not exist, Foucault suggested (in order of hypotheses only) the following features of power:

> (i) that power is co-extensive with the social body; there are no spaces of primal liberty between the meshes of its network; (ii) that relations of power are interwoven with other kinds of relations (production, kinship, family, sexuality) for which they play at once a conditioning and a conditioned role; (iii) that these relations don't take the sole form of prohibition and punishment, but are of multiple forms; (iv) that their interconnections delineate general conditions of domination, and this domination is organized into a more-or-less coherent and unitary strategic form; that dispersed, heteromorphous, localized procedures of power are adapted, re-enforced and transformed by these global strategies, all this being accompanied by numerous phenomena of inertia, displacement and resistance; hence, one should not assume a massive and primal condition of domination, a binary structure with 'dominators' on one side and 'dominated' on the other, but rather a multiform production of relations of domination which are partially susceptible to integration into overall strategies; (v) that power relations do indeed 'serve', but not at all because they are 'in the service of' an economic interest taken as primary, rather because they are capable of being utilized in strategies; (vi) that there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the

> compatriot of power. It exists all the more by being in the same place as power; hence, like power, resistance is multiple and can be integrated in global strategies. (Foucault, 1980, 142)

Foucault insisted that to study the elusive problem of power relations, one should trace the mobile systems of relationships and syntheses which provide the "conditions of possibility" for the formation of certain orders and levels of objects and of forms of knowledge of such objects (the "historical *a priori*"). The political instrumentality of this method of investigating power relations consists in raising people's awareness of both the relations of power in which they are implicated/inserted, and the choice that they have to transform them, or escape through their actions of resistance and rebellion in order not to be subjugated any longer. As Foucault stated, "all of my investigations rest on a postulate of absolute optimism" (1980, 174).

The overall methodological program that Foucault outlined consists, in his own words, in "escap[ing] from the limited field of juridical sovereignty and State institutions, and instead... study[ing] the techniques and tactics of domination" (Foucault, 1980, 102).

2.1.3. The concept of governmentality

Derivative from the new perspective on power and government[41], the concept of governmentality emerged from Foucault's later philosophy (from 1976 to 1984), where

[41] It has been suggested in the literature that, in his later work, Foucault substituted the term "government", as a distinctive modality of the exercise of power, for "power" in general, because of the ambiguity of the latter term and the association with "domination" and "repression". Foucault distinguished, though, "government" from two other types of power relationship, namely, strategic games between liberties, and domination (see Hindess, 1996, 99). Thomas Lemke (2000) provides the following summary of Foucault's understanding of "government": "*Government* refers to more or less systematized, regulated and reflected modes of power (a 'technology') that go beyond the spontaneous exercise of power over others, following a

he defined and explored "a fresh domain of research into what he called 'governmental rationality', or, in his own neologism, 'governmentality'" (Gordon, 1991, 1). Foucault problematized the orthodox "forms of political reason", based on "constitutive oppositions of State/civil society, domination/emancipation, public/private" (see Rose, 1996, 37 -64).

Sensitive, as it is, to discourses, practices and techniques of government, this perspective targets, in general, the rather dynamic map of political rationalities, which are more than just ideologies, and connote the ways of thinking about government as activity. In particular, it has the potential to both interpret the unique policy approach to the Internet DNS privatization in the code of the neo-liberal rationality of less government and more self-governance, and broaden our understanding of the governance process in the communications field.

Foucault (1988) defined "government" in generic terms as the "conduct of conduct", as activity of influencing others', or oneself's, behavior by applying techniques and practices belonging to particular rationalities of rule. Among other things, government as an activity refers to the relations concerned with the exercise of political sovereignty (political government as the exercise of a central, unified form of state sovereignty).[42]

In this sense, the government of conduct has occurred, consecutively, within three frames – in Mitchell Dean's view, all extant today: the government of acts and things (dispositional government), of processes and conditions (processual government), and of

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specific form of reasoning (a 'rationality') which defines the telos of action or the adequate means to achieve it" (5).

[42] As some critics notice, Foucault was mainly concerned with the questions of "government of oneself", or "genealogy of ethics". Therefore, "his analysis of government of the state must be pieced together from the ideas sketched out in a few short, and sometimes enigmatic, essays and interviews" (Hindess, 1996, 106).

existing forms of government and self-government (reflexive government) (Dean, 1999, 200).

In Foucault's writings "governmentality" is conceived in narrow historical terms, as a distinctly new approach to governing, detectable in practices and technologies of rule, emerging in Europe from the sixteenth century, and in the manner of conceptualizing power (Foucault, 1991, 102-104). In this narrow, historical sense, it is a particular way of governing, "which has as its target population, as its principal form of knowledge political economy" (Foucault, 1991, 102), and which is "associated with the parallel crystallization of new forms of expertise and state institutions" (Gane and Johnson, 1993, 7).

In a more general way, governmentality refers to:

1/ "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);

2/ "the bodies of knowledge [theories, ideas, philosophies], belief and opinion in which we are immersed" (Dean, 1999, 16), and which are a part of our social and cultural products;

3/ the way in which thought both "operates within our organized ways of doing things" (Dean, 1999, 17 – 18) ("regimes of practices") and "is embedded within programs for the direction and reform of conduct" (18).

Following Foucault, Dean calls this particular approach to governmentality "analytics of government" and explains that "to analyze mentalities of government is to analyze thought made practical and technical" (Dean, 1999, 18): "An analytics of government... assumes that discourses on government are an integral part of the

workings of government rather than simply a means of its legitimation, 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).

From the "analytics of government" perspective, governance policies (programs, discourses, particular decisions, etc.) are embedded in a specific set of rationalities that provide for their intelligibility and general acceptance. The key in grasping the logic of a particular "regime of government" consists in mapping its governmentality; that is, detecting and identifying the rationalities of government embedded, on the one hand, in the always-already-there environment of dominant discursive and non-discursive practices, and, legitimizing, on the other hand, the particular policies, rendering them achievable and desirable.

2.1.4. Neoliberal governmentality

Recognizing that, since the end of the 18th century, the liberal rule has been shaping the political contours of the modern world, Foucault reviewed the shifting dynamics and complexity of the rationalities of rule in some post-war Western liberal democracies – West Germany, the United States, and France (see Gordon, 1991, 41- 44). For him, liberalism was not simply a doctrine, or set of doctrines, of political and economic theory, but "a style of thinking quintessentially concerned with the art of governing" (Gordon, 1991, 14).

Thus, the liberal rationality of government not only recognizes that the exercise of power requires a degree of freedom on the part of its subjects, but also believes that the long-term objectives of government are best pursued through the free decisions of individuals. That is why it requires that the state should act to promote that freedom.

Yet, although arguing against excessive regulation of behavior, liberal rationality does not dismiss regulation as such. Rather, a comprehensive regime of regulation should disintegrate in a number of specialized regimes. In this view, "limited government is a recipe for success while unlimited government is a recipe for failure" (Hindess, 1996, 128).

As liberal rationality is concerned with an individual's conduct according to certain standards of reason and order, forms of indirect regulation are invented and applied (i.e. education, design of public buildings and spaces enabling regulation through the normative gaze of their fellows). "In space of the pervasive effects of discipline, an equally pervasive governmental management of freedom is endorsed, to similar effect" (Hindess, 1996, 131).

In light of Foucault's "analytics" of the liberal political reason, a number of authors in Political Science and Sociology have begun investigating the "history of the present" by unraveling the neo-liberal governmental rationalities and newly-invented techniques. In view of the "difficult and uncertain" reception of Foucault's work in England (Gordon, 1996, 253), in November 1989, at a meeting in London, the "History of the Present" research network was formed "to link researchers actively seeking to use and develop the intellectual tools and approaches proposed by Michel Foucault for the

analysis of our present".[43] From this collective initiative of British, U.S., Australian, and Canadian scholars[44], a regular meeting forum emerged located in London, and a number of publications, in the 1990s, suggested the establishment of an interdisciplinary field, namely Governmentality Studies.

As a result, a new articulation of neo-liberalism or "advanced liberalism" (Rose), as the dominant rationality of government in the second half of the 20th century, entered the academic debate. This approach transcends the institutional analysis and aims at uncovering the rationalities and technologies of government. Nikolas Rose, for instance, detected new "techniques of government that create a distance between the decisions of formal political institutions and other social actors, conceive of these actors in new ways as subjects of responsibility, autonomy and choice, and seek to act upon them through shaping and utilizing their freedom" (Rose, 1996, 53-54).

In confirmation of the above inferences, Peter Miller and Nikolas Rose argue that, in advanced liberal democracies, "[m]odern political power does not take the form of the domination of subjectivity... Rather, political power has come to depend upon a web of technologies for fabricating and maintaining self-government" (Miller and Rose, 1993, 102). Interested in the "advanced liberal rule", Rose (1996) states that this rule "does not seek to govern through 'society', but through the regulated choices of individual citizens, now construed as subjects of choices and aspirations for self-actualization and self-fulfillment. Individuals are to be governed through their freedom... as members of heterogeneous communities of allegiance, as 'community' emerges as a new way of

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[43] See http://www.uta.fi/~pttaku/hipe.html.

[44] Among the inaugurators of the network and participants in the first "Foucault and Politics" conference in September 1992 were: from Britain, Andrew Barry, Thomas Osborne, Nikolas Rose, Colin Gordon; from the U.S.A., Barbara Cruikshank; from Australia, Ian Hunter, Barry Hindess, Mitchell Dean; and, from Canada, Alan Hunt (see Barry et al., 1996).

conceptualizing and administering moral relations amongst persons" (41). Overall, the neo-liberal governmentality, which rose to prominence under conservative governments in the 1980s, has placed emphasis upon the self-government of individuals and sought to limit the incidence of "the state" upon the lives and decisions of individuals.

2.1.5. Reflexive government

In his attempt to diagnose the contemporary transformations in governmentality, Mitchell Dean suggests that "the government through processes is increasingly displaced by a government of government, a 'reflexive government'" (Dean, 1999, 149). What marks the novelty of our present, he argues, is that "at least one variant of neo-liberalism" considers "the task of national government to be to govern without governing society" (172), "less to govern social and economic processes external to itself than to secure the institutions and mechanisms of social and economic government themselves" (172); hence, national governments' major concern with the reform of the performance of the existing governmental institutions and techniques "through the activation of the energies and capacities of existing agencies and institutions" (179).

As Dean contends, "[t]he imperative of reflexive government is to render governmental institutions and mechanisms, including those of the social itself, efficient, accountable, transparent and democratic by the employment of technologies of performanc" (193).

The analytical frame of "reflexive government", developed by Dean on Foucault's concept of governmentality, provides for the understanding of, first, how "the

governmentalization of the state – by which the state came to take on the function of the care of populations and individuals – is today... being partially displaced by... and recoded within another trajectory whereby the mechanisms of government themselves are subject to problematization, scrutiny and reformation" (Dean, 1999, 193) (the "governmentalization of government"), and, second, why the advanced liberal practices are concerned "to promote and then govern through forms of 'indigenous government' of individuals, organizations and collective" (149).

Still in 1981, Foucault suggested that "the left" should reply to the "reflexive government" variant by a governmental logic involving "a way for the governed to work with government, without any assumption of compliance or complicity, on actual and common problems" (see Gordon, 1991, 48). Foucault stated that "[t]o work with a government implies neither subjection nor global acceptance. One can simultaneously work and be restive" (Foucault, 1982, 29 – 40).

Foucault's concept of power made visible the "capillary" forms of domination and subjugation, without excluding the central institutions from being possible objects of analysis. Indeed, Foucault explained his approach as follows: "I don't want to say that the State isn't important; what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the State. In two senses: first of all because the State, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the State can only operate on the basis of other, already existing power relations. The State is superstructural in relation to a whole series of power networks that invest the body,

sexuality, the family, kinship, knowledge, technology and so forth" (Foucault, 1980, 122).

2.1.6. "The Foucault effect": affinities and advances

Foucault's ideas encountered considerable interest and extensive criticism even in his life-time. Jürgen Habermas, for instance, described Foucault as "a conservative who is nostalgic for an archaic past", in accordance with his critique of postmodernism as a nostalgic desire to return to the premodern.[45] As Foucault replied, his intention was rather to "bring to awareness the dangers that have resulted from attempts to put the ideas of the Enlightenment into practice in social institutions that have had different historical effects than were intended" (see Hoy, 1988, 21).

Habermas claimed that Foucault was engaged in "(1) a self-referential, total critique of reason (2) in the form of a transcendental, genealogical historiography (3), which is itself based on a theory of all-encompassing power" (as formulated in Kelly, 1994, 371).

On an epistemological level, the disagreements between Habermas and Foucault rested on the question of what constitutes the conditions of knowledge. For Habermas, in his theory of the ideal speech situation, and for the Frankfurt School critical theorists, in general, true knowledge can be acquired if the way of thinking is free from distortions imposed on individuals by repressive social institutions. Contrarily, for Foucault,

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[45] For a pointed analysis of the philosophical differences between Foucault's and Habermas' ideas, see Kelly (1994). Some critics of Foucault (i. e. Nancy Fraser and Habermas himself) recognized that the objections to Foucault's ideas were often a result of "misunderstanding" (see Kelly, 1994, 366).

knowledge is never free from power relations, because power constitutes the "unthought that conditions knowledge" (see Hoy, 1988, 25).[46]

Hindess (1996) established points of affinity between Foucault's position and that of critical theory: 1/ Foucault's "refusal" to place the orthodox notion of power "at the center of his analysis of government" corresponds to critical theory's rejection of the idea that "government rests on the consent of its subjects" (145); 2/ Foucault's interpretation of discipline as a form of political rationality, which is reminiscent of critical theory's "concern with the subordination of human individuals to instrumental reason" (Weber and Frankfurt School); 3/ Foucault's insistence on reading power relations as omnipresent, which is a clear understanding of critical theory: the idea of that "insidious power that operates over people's thoughts and desires" (Marcuse, Lukas) (146).

Despite the above parallels, according to Hindess, there are, indeed, fundamental differences between the accounts of power provided by critical theory and Foucault:

1/ concerning processes of rationalization in Western societies in the modern age: since Weber, critical theory has universalized instrumental rationality as an all-embracing phenomenon of rationalization; Foucault shifted the focus "from the universal to the singular", from framing critical social research in one universal instrumental reason to investigating the emergence of particular rationalities, "without assuming any necessary overall coherence" between them; he "emphasized their local and contingent aspects" (148);

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[46] Hoy (1988) speculates that "Foucault finally abandoned his effort to formulate his theory of power", because he realized that "power cannot be thought in the modern way by being completely represented in a theory", if it constituted the "unthought" in relation to knowledge: "It resists theory, not because it is mysterious, but because it is not a single thing. Power is the unthought that is linked to every mode of knowledge, but since there are different modes of knowledge, there will be different power relations conditioning the different disciplines" (26).

2/ concerning "the ideal of the person as an autonomous moral agent": critical theory holds the Enlightenment ideal of human emancipation from any "illegitimate power" (148 - 149); Foucault, in contrast, suggested that, because power is "an inescapable feature of human interaction" (150), any such normative ideal should be seen as one of domination's most fundamental effects.[47]

Overall, Foucault has been criticized for condemning the modern period without suggesting alternatives to present institutions, because he rejected the normative approach to society (when the modern progressivism is problematized, there are no criteria for judging social orders as being better or worse than one another). Nancy Fraser, for instance, while acknowledging Foucault's contributions to a positive and broad conception of power, encounters "some grave difficulties" in it, such as a "value-neutral account of modern power" and "normative ambiguities" in general (see Fraser, 1992, 217 – 233).[48]

Gordon refers, as well, to objections raised by the Marxist left that "this new attentiveness to the specifics of power relations... failed to address or shed light on the global issues of politics, namely the relations between society and the state, as a network of omnipresent relations of subjugating power" (Gordon, 1991, 4).

Paradoxically, as our further analysis of the debate in Globalization Studies and Organization Studies will reveal, the indifference to social stratification in their

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[47] Foucault strongly rejected the possibility of such an ideal, apparently referring to Habermas theory of communicative action: "The thought that there could be a state of communication which would be such that the games of truth could circulate freely, without obstacles, without constraint and without coercive effects, seems to me to be Utopia" (Foucault, 1988, 18).

[48] In an article published in 2003, Fraser seems more adamant to reconsider the value of Foucault-inspired analysis of the present (the "neo-liberal globalization" or "postfordism" in the terms that she privileges). Moreover, when musing that "networks may... be emerging as important new vehicles of postfordism", Fraser suggests that "[c]ritical theories of globalization would do well to try to analyze them [the networks] in Foucauldian terms. Above all, we might explore their articulation (both competitive and cooperative) with more familiar types of regulatory agencies" (Fraser, 2003, 169).

perspective on power, which Foucault and the Governmentality theorists developed, enabled new and more pertinent imagery and conceptual inventiveness to emerge in relation to contemporary social phenomena.

The governmentality school of research has itself attracted broad attention and followers, but has been criticized for its exclusively "programmatic orientation", its emphasis on "broad governmental themes rather than specific neo-liberal projects" (Larner, 2000, 12). As Larner suggests, "without analyses of the 'messy actualities' of particular neo-liberal projects, those working within this analytic run the risk of precisely the problem they wish to avoid – that of producing generalized accounts of historical epochs" (12).

Nonetheless, it has been recognized that, in comparison to approaches that treat neo-liberalism either as ideology or as an economic-political reality premised on the market extension to government, the perspective of governmentality "deciphers the so-called 'end of politics' itself as a political programme" (Lemke, 2000, 10). As Lemke (2000) comments, "the so-called 'retreat of the state' is in fact a prolongation of government, neo-liberalism is not the end but a transformation of politics, that restructures the power relations in society. What we observe today is not a diminishment or a reduction of state sovereignty and planning capacities but a displacement from formal to informal techniques of government and the appearance of new actors on the scene of government (e.g. NGOs), that indicate fundamental transformations in statehood and a new relation between state and civil society actors. This encompasses on the one hand the displacement of forms of practices that were formerly defined in terms of nation

state to supranational levels, and on the other hand the development of forms of sub-politics 'beneath' politics in its traditional meaning" (11).

As it is argued in the next section, the "globalization trend" has been seen as a well-guided governmental project exemplifying the neo-liberal governmentality in the late 20th century. Coinciding with the commercialization of the Internet, this project is benefiting from both the global communication connectivity and the democratic instincts and aspirations of the so-called "civil society". As a result, locally created forms of community self-regulation are transplanted to the global level, and forums are inaugurated for collaboration on contentious issues in a diversity of problem-domains with the participation of stakeholders from governments, businesses and non-governmental organizations.

2.2. Political perspective: power in global governance

We live in times marked by a rapid change in, literally, every dimension of human and social experience. The sense of entering a qualitatively different stage in social organization has induced ample research and theorizing efforts. A broad range of thinkers (in disciplinary and geographical scope) have studied and encapsulated in concepts and theories the defining features of these shifting conditions.[49] What has emerged from the academic and political debates is a Picasso-like asymmetrical image of the world-society,

[49] Conventionally, Daniel Bell's *The Coming of Post-Industrial Society* (1973) is considered the first influential academic publication in North America announcing the beginning of the post-industrial economic order. Darin Barney (2004) outlines four distinct academic discourses preceding the "globalization" debate: 1/ Post-industrialism (Alain Touraine, 1971; Daniel Bell, 1973; Herbert Marcuse, 1964; Jacques Ellul, 1964); 2/ Information Society (Yoneji Masuda, 1981; Marc Porat, 1977); 3/ Post-Fordism (Michael Aglietta, 1979; Alain Lipietz, 1987); and 4/ Postmodernism (Michel Foucault, Jacques Derrida, Jean-Francois Lyotard, Jean Baudrillard, Gilles Deleuze and Felix Guattari) (5 – 19).

consisting of a multitude of multicolored, misfitting and constantly shape-changing fragments, corresponding to diverse cultures, minority-experiences, and discourses.

The frame that holds the fragments together is, arguably, the centuries-old mold of political and economic liberal rationality, which favors the free market rule and the limited-government formula as providing the most benign environment for capital's aspirations for ever-expanding productivity and markets. In the late 20th century, the major and most recognizable effect of this rationality was designated "globalization".[50]

2.2.1. The Great Globalization Debate

The "great globalization debate" (Held and McGrew, 2000), which dominated the Social Sciences in the 1990s, has been examining the shifting matrix of power relations, rearranging the Industrial-age social organization in unstable postmodern configurations (see Castells, 1998; Falk, 1995; Strange, 1996; Offe, 1996; Reinicke, 1998).[51]

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[50] It is a well-developed and agreed upon thesis in the academic debates that the term "globalization", in historical sense, reflects the tendency of increasing interconnectedness among civilizations and peoples, and not just the political and cultural realities of the last several centuries(see Modelski, 2000, 49 – 54). Thus, David Held et al. (1999) distinguish between three historical forms of political globalization: 1/ early modern globalization (14th – 18th century), marked by "the growing centralization of political power within Europe, the sedimentation of political rule into state structures, the territorialization of politics, the spread of the interstate order, the development of forms of accountability within certain states and, at the same time, the denial of such accountability to others through colonial expansion, conquest and war" (77); 2/ modern globalization (19th – 20th century), "marked by the internationalization and transnationalization of politics, the deterritorialization of aspects of political decision-making pertinent to states, the development of regional and global organizations and institutions, the emergence of regional and global law and a multilayered system of global governance, formal and informal" (77); and 3/ contemporary globalization (1945 on), marked by "growing internationalization and transnationalization of politics, governance and authority, proliferation of international and transnational regulatory regimes, multilayered governance", "unprecedented level of flows, agreements, networks (formal and informal) and connections", "real-time global communication and media infrastructures", "deterritorialization and reterritorialization" (78 – 80).

[51] Douglas Kellner depicts a wide variety of approaches to the phenomena called globalization: as "the Westernization of the world", as "a cover for the ascendancy of capitalism", "as generating increasing homogeneity", "as producing diversity and heterogeneity through increased hybridization", etc. He cautions that the term is "not innocent nor neutral in many of its uses and often serves to replace older discourses like 'imperialism' but also 'modernization'" (2).

Underscoring the fact that "no singular account of globalization has acquired the status of orthodoxy" and "[n]o single universally agreed definition of globalization exists", David Held and Andrew McGrew (2000, 2-3) distinguish two major groups of authors on globalization: globalists and sceptics.[52] Through the globalists' optics, "contemporary globalization is a real and significant historical development" (2) defined by its "material, spatio-temporal, and cognitive aspects" (3). It refers to the "entrenched and enduring patterns of worldwide interconnectedness", and "represents a significant shift in the spatial reach of social action and organization" (3) towards supranational scale.

To this interpretation of the contemporary trends, the sceptics oppose the view that "the discourse on globalization... is... an ideological construction" (5), "a convenient myth which, in part, helps justify and legitimize the neoliberal global project, that is, the creation of a global free market and the consolidation of Anglo-American capitalism within the world's major economic regimes" (see Held and McGrew, 2000, 5).[53] Instead of detecting a rupture in the social condition, the sceptics see a continuation

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[52] In a more nuanced classification of the competing views on globalization (see: Held et al., 1999), the authors distinguished three schools of thought: 1/ hyperglobalizers, who conceive of globalization as "a new era in which peoples everywhere are increasingly subject to the disciplines of the global marketplace"; 2/ sceptics, who argue that "globalization is essentially a myth to conceal the reality of an international economy increasingly segmented into three major regional blocks in which national governments remain very powerful"; and 3/ transformationalists, who regard the "contemporary patterns of globalization" as "historically unprecedented", inducing "profound change" in "states and societies across the globe", leading to a "more interconnected but highly uncertain world" (2). The consecutive fusion of the first and third categories of views into the group of the "globalists" has sharpened the conceptual distinctions.

[53] Barney (2004) demonstrates that, since the 1970s, the deterministic tendency to explain social change with information or technological "revolution" has been met with a similar sceptical attitude. Thus, according to some critics, "post-industrialism named an ideology, not an economic reality" (7); "the distinction between the information and industrial economies was a false one" and "the development of new information technologies and practices occurred under the logic of the market, and were simply instrumental to the reproduction of capitalist relations of production" (9-10). In this light, the sceptics' position on globalization can be interpreted as the culmination of "a growing sensitivity to the ideological and mythological character of the discourse surrounding the information society" (10).

of the capitalist mode of production and a growing "internationalization" or "regionalization" of national economies and societies.

Held and McGrew (2000) argue that the sceptics' criticism stems from two ideological strands, namely, the Marxist and the "realist" (in International Relations). Thus, the contemporary social order is interpreted by neo-Marxists as "a new mode of Western imperialism dominated by the needs and requirements of finance capital within the world's major capitalist states" (2000, 5). The neo-liberal "realists", on the other hand, see "the recent intensification of international interdependence" and "the existing international order as constituted primarily by and through the actions of the mightiest economically and militarily powerful states" (5).

As Table 2 demonstrates, the major opposing views on globalization collide on a number of structural and discursive issues.

Table 2: The Great Globalization Debate in sum

	Sceptics	Globalists
1. Concepts	- Internationalization not globalization - Regionalization	One world, shaped by highly extensive, intensive and rapid flows, movements and networks across regions and continents
2. Power	- The nation-state rules - Intergovernmentalism	- Erosion of state sovereignty, autonomy and legitimacy - Decline of nation-state - Rise of multilateralism
3. Culture	- Resurgence of nationalism and national identity	- Emergence of global popular culture - Erosion of fixed political identities - Hybridization
4. Economy	- Development of regional blocs - Triadization - New imperialism	- Global informational capitalism - The transnational economy - A new global division of labour
5. Inequality	- Growing North-South divide	- Growing inequality within and

	- Irreconcilable conflicts of interest	across societies - Erosion of old hierarchies
6. Order	- International society of states - Political conflict between states inevitably persists - International governance and geopolitics - Communitarianism	- Multilayered global governance - Global civil society - Global polity - Cosmopolitanism

Source: Held and McGrew (2000), 37

For the globalists, the "erosion of state sovereignty, autonomy and legitimacy" holds the promise of reaching the ideal of "one world" of hybrid cultures, movements and identities, which coexist on the principle of "cosmopolitism", and function as a "global civil society". This discourse, apparently, has adopted the postmodern imagery and preoccupation with power in political life rather than justice, with indeterminate processes rather than the universal human condition, and with an open-ended sequence of changes rather than a linear progressive historical development. Or, as Michael A. Peters (2002) suggests, "[p]ostmodernism has finally moved from the realms of aesthetics, popular culture and philosophy into the worlds of foreign affairs and economic development" (1).

While celebrating the promise of an era of "cosmopolitan democracy" for the emerging "global polity" or "world society", the globalists, though, have to accept the sceptics' detection of a growing inequality within and across societies. Yet, as for the globalists the nation-state's regulative power declines in the conditions of "global informational capitalism", it is "global corporate capital" (the multinational corporations) that is responsible for "the organization, location and distribution of economic power" (25) around the globe; hence, the requirement for an adequate "multilayered global

governance" mechanism, which attends to the grievances of communities around the world.

Sceptics anchor their discourse in the concepts of internationalization, intergovernmentalism, imperialism, geopolitics, and international governance, because they conceive the present as an intensification of intrinsic capitalist tendencies.

According to Held and McGrew (2000), the collision of assessments is partially due to differing preferences in problematic fields and data. Thus, 1/ sceptics emphasize "the organization of production and trade", while "globalists focus on financial deregulation and the explosive growth of global financial markets" (the spread of a global currency market and the attendant mobility of investment capital); and 2/ sceptics underline "the continuing primacy of the national interest and the cultural traditions of national communities", while globalists emphasize "the growing significance of global political problems" (38).

Although exhibiting differing interpretations of contemporary social dynamics, the globalization debate, as a whole, correctly detects the changing paradigm of structural power relations on the supranational level, often identified as the victory of the market over the state.[54]

[54] Barney's analysis supports this observation: "Globalization, of course, admits of multiple meanings and consists in many aspects. In relation to the status of political authority organized and exercised at the level of the nation-state, however, its meaning is fairly precise: the capacity of states to exercise exclusively the ultimate power of judgment and action within their territories has been decisively diminished" (2004, 114).

2.2.2. Sharing political power

At the core of the contemporary globalization debate is the problem with the nation-state sovereignty and autonomy. It has been broadly accepted that the center of gravity in world politics has shifted, during the last quarter century, from the public agencies of the state to private bodies of various kinds, and from states to markets and market operators.

Consequently, a shift in the dominant Political Studies' paradigm is observed: from considering the state as the only source of power over outcomes to realizing that the contemporary nation-state is just one source of authority among several, with limited powers and resources. Thus, escaping the state-centered concept, the academic discourse is entering the broader, and largely still in flux, field of global governance.

In 1995, based on the EU experience in pooling the member-states sovereignty, Held concluded that "*the operation of states in an ever more complex international system both limits their autonomy (in some spheres radically) and impinges increasingly upon their sovereignty.* Sovereignty itself has to be conceived today as already divided among a number of agencies – national, regional and international – and limited by the very nature of this plurality" (135 – emphasis in the original).

As discussed before, the contributors to the globalization debate differ on the causality of these dynamics. Thus, the sceptics' linear causality (i.e. the logic of capitalism's expansionistic tendencies) is seen by the globalists as reductionism. In turn, they insist on a complex of factors that has determined contemporary globalization in the post-WWII period: economic (intensification of trade and financial transborder flows),

demographic (increased labor migration), political (the Cold War strategy of building alliances of states), infrastructural (development of network communication technologies, such as satellites and the Internet), and institutional (the exponential growth in the number of international organizations and agreements) (see Held and McGrew, 2000).

There are authors, though, who juxtapose these "impersonal" factors to distinct political strategies, which can be seen as inducing further interconnectedness. Thus, Robert O. Keohane proposes a rational-institutionalist interpretation of the contemporary globalization causality: "The decision by the United States in 1945 to maintain a capitalist economy with increasing openness (measured by such indicators as trade and investment as shares of gross domestic product) has been a crucial source of the globalization – the increasingly global character of social, economic, and political transactions – that we now experience. And the outward orientation of US policy clearly owes a great deal to the Soviet challenge and the Cold War. Now that the Cold War is over, globalization continues apace and has implications for sovereignty that affect the United States as well as other capitalist democracies" (Keohane, 2000, 110).

Wolfgang Reinicke (1998; 2000) agrees that political and economic liberalization and technological change are the driving forces behind the diminishing ruling capacity of the nation states and the increasing interconnectedness among private actors (on regional and global levels). Yet, he focuses on the two decisive "governance gaps" that have emerged (see Reinicke and Deng, 2000). First, an "operational gap" marks the public authorities' inability to find adequate policy responses to increasingly complex social issues; often this occurs because of lack of information, knowledge and adequate policy tools. Second, a "participatory gap" in the decision-making process undermines the

legitimacy of the state and the multilateral system; this gap is more pronounced in light of the increasing issue complexity and interconnectedness, which require a broader consensus on policy issues.

Despite the differing causality hypotheses, scholars in the globalization field have already accepted that, in view of the expanding transnational interdependencies and deterritorialization (i.e. multinational corporations' activities; ecological disasters; global criminal activities, etc.), the nation-state's capability to enforce particular regulative regimes has been diminished.[55]

The modern state faces "political deficit" in democracy, regulation and justice; "new political energies and forces which are providing an impetus to the reconfiguration of political power"; and "a shift" from national to cosmopolitan political and ethical frame of reference (402). Based on these, a "cosmopolitan institutional framework" for global governance is envisioned, where states hold a "markedly diminished role in comparison with institutions and organizations of regional and global governance" (Held and McGrew, 2000, 402).

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[55] Thus, Susan Strange (1996) states that "the impersonal forces of world markets... are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong" (4). Claus Offe (1996) suggests, as well, that instead of "giving orders and exerting power" in its capacity of a sovereign authority, the state has gradually accepted the function of a coordinator or a moderator (63). Reinicke (1998) insists, in addition, that "globalization is for the most part a corporate-level phenomenon" (economic globalization). The "spatial reorganization of corporate activity leads to the emergence of a single, integrated economic geography defined by the reach of corporate industrial networks and their financial relationships. These networks and relationships cut across multiple political geographies, challenging the operational dimension of *internal* sovereignty, as governments no longer have a monopoly of the legitimate power over the territory within which these private sector actors organize themselves" (7 – emphasis in the original).

In this framework, "the meaning of sovereignty changes" from "exert[ing] effective supremacy" over particular territory to becoming "a bargaining resource for a politics characterized by complex transnational networks" (see Keohane, 2000, 117).[56]

In general, the changing "relations between political globalization and modern nation-states" comprise the following dynamics: 1/ "effective [political] power is shared [between national governments and] diverse forces and agencies at national, regional and international levels"; 2/ "the idea of a political community of fate" (the source of sovereignty and legitimacy for the modern state) transcends the boundaries of a single nation-state today; 3/ the notion of "national sovereignty as an illimitable, indivisible and exclusive form of public power" is displaced by the notion of "fractured domains of political authority"; 4/ "new types of boundary problem" emerge (such as "economic regulation", "resource depletion and environmental degradation"), which reject "the power logic" of coercion and require cooperation, and 5/ as "the distinctions between domestic and foreign affairs... are no longer clear cut" in all major areas of policy, the "national political communities" are involved "in intensive transboundary coordination and regulation" (see Held et al., 1999, 80-81).

[56] Held and McGrew (2000) speculate further that "[s]tates would need to be rearticulated with, and relocated within, an overarching political framework which would strip away the idea of sovereignty from fixed borders and territories, and rearticulate it as a form of legitimate political authority which could be embedded or entrenched in diverse realms, from local associations and cities to states, regions and, eventually, the global order (402). They conclude that "[a] new regime of government and governance is emerging which is displacing traditional conceptions of state power as an indivisible, territorially exclusive form of public power. Far from globalization leading to 'the end of the state', it is stimulating a range of government and governance strategies and, in some fundamental respects, a more activist state" (422).

2.2.3. The Network Society thesis

As it was suggested previously, in the postmodern imagery, the rejection of fixed foundations for truth and identity has mobilized the metaphors of networks and flows as implying decentralization of power, proliferating connectivity, reconfiguration of relationships, and localization of resistance and empowerment. An influential strand of the globalization debate has sprung from this imagery of shifting structural and discursive "flows", and it is linked to Manuel Castells' theory of the Network Society.

Sociologist Manuel Castells (1996, 1997, 1998) has developed the thesis that the contemporary social reality is best described through the prism of information and networks. According to him, "[n]etworks constitute the new social morphology of our societies, and the diffusion of networking logic substantially modifies the operation and outcomes in processes of production, experience, power and culture" (Castells, 1996, 469).[57]

As the argument goes, recent technological changes, namely, the rise of information network technologies, have created a new type of economy organized around global networks of capital, management and information, described by the metaphor of "informational space of flows". In general, global information networks have played a decisive role in the introduction of new organizational possibilities for human associations and institutions by becoming the infrastructure of the network society.

Table 3 presents the attributes of the network society as isolated by Castells and summarized by Barney (2004, 27-32).

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[57] The concept, though, would apply only to societies 1/ that function through infrastructure of digital network communication technologies and information management, and 2/ where networks, "as the basic form of human organization", are reproduced and institutionalized (see Barney, 2004, 25).

Table 3

Attributes of the Network Society
• At the economic base of the network society is an "informational" – as opposed to strictly industrial – capitalist economy. • The economy of the network society is organized globally, on the network model. • In the network society, human experience of time and space is displaced by "timeless time" and the "space of flows". • In the network society, power and powerlessness are a function of access to networks and control over flows. • The principal source of conflict and resistance in the network society is the contradiction between the placeless character of networks and the rootedness of human meaning.

In light of the above-presented features, it can be inferred that, according to this new technologically-deterministic sociology of late capitalism, global information networks relate to the networks of power relations in three significant ways.

First, according to Castells, in a network society, access to essential social networks (Internet among them) equals enfranchisement in the society. Although the "network society" metaphor suggests a non-hierarchical, decentralized structure, it is recognized that the topology of a network and a node determines the level of power-

capacity, and the notion of empowerment does not simply refer to providing access to a particular network.[58]

Second, information networks replace earlier organizational forms. They are seen as changing both the quality of human experiences ("time-space compression", "deterritorialization", "decentralization and control", and "interactivity and customization") (see Barney, 2004, 60-68), and "the way power is exercised and governance is organized in global politics" (see Rosenau and Singh, 2002, 2). Castells himself postulates that "the Internet is the technological basis for the organizational form of the Information Age: the network" (Castells, 2001, 1).[59]

Third, because of their interactive nature, information networks "reconfigure, constitute, or reconstitute identities, interests, and institutions" (Rosenau and Singh, 2002, 13).[60]

Castells' network-society model is perceived by scholars as depicting, especially correctly, the structural shifts in contemporary society. For Barney (2004), though, when it is adopted non-critically, the model poses the danger of ideologizing the otherwise revealing insights in Castells' sociological theory. When Castells claims that the

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[58] As Barney (2004) comments in his presentation of Castells' thesis, access to networks constitutes "an important threshold of inclusion and exclusion, a condition of power and powerlessness, a source of dominance and subjugation" (30). In an inference that could be related to the ICANN case, he suggests that "some very powerful nodes (i.e. internet service providers and portals) will actually control access to, and use of, network ties and infrastructure by other, less powerful nodes (i.e. individual users). Thus while access is a minimum condition of enfranchisement in the network society, it by no means ensures equality... Under these conditions, control over access becomes a crucial mechanism of power and domination, and the divide between the included and the excluded constitutes a line of stratification with serious political and material consequences" (31).

[59] Singh (2002) explains that "[d]igital technology changed the way information industries were organized" (3) – from vertically integrated industries (i.e. the telephone industry) to horizontal integration of industry types.

[60] Singh (2002) suggests, for instance, that "[t]he collective meanings that actors hold about themselves, or meanings imposed upon them, are shaped by networks and in turn influence networks" (15). The ultimate result of this process is that "power shifts away from the original power holders" (13), collective social epistemes are shifting away from hierarchical authoritative contexts privileging nation-states and interconnected networks may flatten hierarchies (17).

computer-based information and communication networks provide a superior organizational form for human action, Barney recommends "moderation in endorsing the explanatory power of this theory" (2004, 178).[61]

I would speculate further, that, as our society begins to accept the network as "the natural model for all things", the social capacity for critical assessment of concrete policies diminishes, and, ultimately, the mechanism of power/knowledge, as described by Foucault, produces compliance with "normalized" practices and discourses.

2.2.4. The Global Governance thesis

In the last decade, the shifting power dynamics in the international scene brought to prominence the concept of global governance. In 1995, the UN Commission on Global Governance published its report *Our Global Neighborhood: The Report of the Commission on Global Governance*. It constituted a platform of democratic values intended to support reforming the international institutions (overall, the UN system) in accordance with the liberal institutional perspective. Overall, a more inclusive and democratic form of global governance was envisioned, based on "a global civic ethics" blending citizens' rights and responsibilities in sharing the planet (48-67).[62]

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[61] He reasons that "when an idea such as this is elevated form heuristic device to the status of an all-encompassing social and historical fact, its function shifts significantly" (180). Thus, "the Network Society becomes the standard for what is normal, desirable, and for what we can reasonably expect". Among the examples of the "normalizing effect" that the concept has produced, Barney mentions the state sovereignty desegregation into "deterritorialized networks of shared power". Although this process induces problems with legitimacy and accountability, the author continues, they are not perceived as "radical" challenges, but rather simply established standards for what we might expect from the state in the network context.

[62] The idea of embedding democratic principles in the emerging global governance system has been shared by a number of authors (see for instance Falk, 1995 and Held, 1995). As the current thesis focuses on processual aspects of the emerging Internet governance regime, the normative strand in the global governance debate has not been investigated.

In the subsequent flood of publications focused on that concept and emanating not only from academics but from international organizations as well, the predominant concern has been with formal, established global institutions, and the challenges to their effectiveness and accountability mechanisms.[63]

From this vantage point, distinctions were drawn between international governance and global governance. The former is defined as "the output of a non-hierarchical network of interlocking international... institutions which regulate the behavior of states and other international actors in different issue areas of world polities, while the latter is deemed to consider "transnational" organizations, along with nation-states, as participating in the production of regulatory output (see Rittberger, 2001, 2). Yet, these attempts to distinguish the two terms are still based on the traditional state-centered view in International Relations. While recognizing the declining capability of states and the increasing involvement of non-state actors in global policy-setting processes, and monitoring of policy-implementation, some authors, usually commissioned by the UN agencies, 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).

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[63] Commenting on the fact that the global governance debate has tended to focus on more formal, established institutions and organizations, Reinicke (2000) warns that "[b]y concentrating on these old and well-worn stories, we may be missing a quiet revolution. Equating politics with political institutions masks a simple truth: individuals and groups, not bureaucrats of formal institutions, drive innovation and learning. Change is a bottom-up process, not a top-down steering committee" (4). This reflected a real-life trend of proliferation of global organizations. Paul F. Diehl estimates, for instance, that more than twenty thousand organizations are active now on the international scene (see Diehl, 2001, 5). International nongovernmental organizations (INGOs), for instance, "have proliferated spectacularly, from 200 active organizations in 1900 to about 800 in 1930, to over 2,000 in 1960, and nearly 4,000 in 1980" (see Boli and Thomas, 2001, 63). Over the past decade, INGOs and regional organizations have played increasingly important roles in global governance. Yet, states still prefer to resolve international issues in formal organizations, because, according to Abbott and Snidal (2001), two features of these organizations – their centralization and independence - make them more effective (15).

In this context, James N. Rosenau (2000) proposed a broader approach to the term "global governance", influenced by the Foucauldian concept of governance and governmentality. He conceived of global governance "to include systems of rule at all levels of human activity – from the family to the international organization – in which *the pursuit of goals through the exercise of control has transnational repercussions*" (181 – emphasis added). From this the author concluded 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... In terms of governance, the world is too disaggregated for grand logics that postulate a measure of global coherence" (183).

According to the above postmodern logic, "global governance" cannot be used synonymously with "a new world order", because the former designates "the vast numbers of rule systems that have been caught up in the proliferating networks of an ever more interdependent world" (184). Although, as the author predicts, in the coming decades, global governance "may not take the form of a single world order", "it will not be lacking in activities designed to bring a measure of coherence to the multitude of jurisdictions that are proliferating on the world stage" (185). This prediction is based on two tendencies, which have been detected by the globalization theorists as well: 1/ "an upsurge in the collective capacity to govern", or "a remarkable expansion of collective power", and 2/ "major shifts in the location of authority" and "the site of control mechanisms" – "from the political realm into the economic and social realms, in general" (185). These "shifts in the loci of governance stem from interactive tensions whereby

processes of globalization and localization are simultaneously unfolding on a worldwide scale" (186).

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). Nevertheless, diversity of arrangements can be expected, which, according to Rosenau, would be distinguished by the source of sponsorship (state-sponsored, non-state-sponsored, and jointly sponsored), and degree of institutionalization (from full institutionalization to nascent processes for rule-making and compliance) (see Table 4, which is an adaptation of Rosenau's matrix of "sponsorship and institutionalization of control mechanisms" - 2000, 188).

Table 4: Matrix of the emerging and existing control mechanisms for global governance

	Nascent	Institutionalized
Non state-sponsored	- non-governmental organizations - social movements - epistemic communities - multinational corporations	- Internet - European Environmental Bureau - credit-rating agencies
State-sponsored	- macro regions - European community - GATT	- United Nations system - European Union - World Trade Organization

Jointly sponsored	- cross-border coalitions - issue regimes	- election monitoring - human rights regime

Rosenau sketches two possible "generic roads" for the evolution of the transnational governance formations. First, "the direct top-down process wherein states create new institutional structures and impose them on the course of events" (187). Second, the indirect "bottom-up process" of rule-making, which is "sponsored by publics or economics". Through "repeated interactions", "habits and attitudes of cooperation" are fostered, "which, in turn, generate[s] organizational activities that eventually get transformed into institutionalized control mechanisms" (187). Rosenau suggests that, from this "matrix" of forces and evolutionary dynamics, variable and complex "processes of global governance [would] evolve" (187).

2.2.5. The Global Public-Policy Network model

While not borrowing concepts and reasoning from the "governmentality" studies influenced by Foucault's perspective on power[64], the investigations and theoretical

[64] Some scholars in International Relations, who try to understand the neoliberal globalization project, have begun expressing particular interest in Foucault's concept of governmentality (see, for instance, Larner and Walters, 2004, 261). Thus, Peter Triantafillou (2004) observes a distinct shift in "analytical focus" within the political science literature "from narrowly-defined policy communities to issue networks, from state and other public agencies to the relations between these and a host of private and voluntary groups and organizations, and from intentions, interests and preferences to concrete practices, mechanisms and devices of steering" (3). As a result, the need of rearticulating the understanding of government and authority emerges, "based on an ontological change that has taken place in recent decades" (3). In this view, network governance has to be addressed "as a set of specific rationalities and technologies of government" that "seek to govern by promoting the self-steering capacities of individuals and organizations" (11). Indeed, Nancy Fraser (2003), a well-known critic of Foucault in the 1980s, now suggests that Foucauldian categories could be "creatively transform[ed] to account for new modes of 'governmentality' in the era of neoliberal globalization" (161). She contends that "[i]f contemporary society is post-fordist and therefore post-disciplinary, it can nevertheless be profitably analyzed from a quasi-Foucauldian point of view. The

reflections in the globalization field confirm the perception of disruption in the established international regimes of governance, leading to the need of inventing or re-applying mechanisms and techniques of government, which have proven their efficiency in other more "local" context, to the global level.

Drawing on cases exhibiting the growing tension between globalization and the state's ability to govern (the two governance gaps), Reinicke and Deng (2000) investigate and promote one such institutionalized mechanism of global governance. They develop the thesis that the strategy of global public policy via mobilizing networks on a sectorial/functional basis provides the only effective governance alternative. In their view, global public-policy (GPP) networks "represent a unique opportunity for governments to regain the initiative in the debate over the future of global governance" (XXI). They are "effective, often remarkably so, in bringing together diverse and sometimes opposing groups to discuss common problems that no one of them can resolve by itself" (XI).[65]

To elaborate the global public-policy model, Reinicke (1998), first, introduced the principle of horizontal subsidiarity (89). As a political instrument "seeking to improve the legitimacy, acceptability, efficiency, and effectiveness of public policies" (89), this

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key is to identify the characteristic ordering mechanisms and political rationality of the emerging new mode of regulation. The result would be a quasi-Foucauldian account of a new form of globalizing governmentality" (167). In her view, "the large body of literature on globalization" has already made "the transnational character of contemporary governmentality" as its "explicit subject" (167). It has been proven that "the postfordist mode of regulation tends to 'govern-at-a-distance' through flexible, fluctuating networks that transcend structured institutional sites" (168).

[65] In 2000, the UN Vision Project on Global Public Policy Networks, launched just a year prior and led by Reinicke, published its report *Critical Choices. The United Nations, Networks, and the Future of Global Governance* (2000), based on the investigation of 21 such networks (from the more than 50 existing GPP networks at the time). UN Secretary Kofi Annan took up suggestions from the Global Public Policy Project in his Millennium Report *We, the Peoples. The Role of the United Nations in the 21st Century* (2000). He stressed that "formal institutional arrangements may often lack the scope, speed and informational capacity to keep up with the rapidly changing global agenda. Mobilizing the skills and other resources of diverse global actors, therefore, may increasingly involve forming loose and temporary global policy networks that cut across national, institutional and disciplinary lines".

principle helps to transfer part of policymaking responsibility to non-state actors, usually business representatives and non-governmental organizations (NGOs). The rationale is that these actors, whose range of activity is not bound by a particular territory, "have direct stakes in the outcomes of a particular public policy" (89).[66] In addition, they possess better knowledge and understanding of the "increasingly complex, technology-driven" public-policy issues, which, in turn, "will generate greater acceptability and legitimacy for global public policy" (90).

The analysis of the decision-making practices in a number of GPP networks has led to the conclusion that, despite the diversity in forms, these formations perform six major functions (see Reinicke and Deng, 2000, 27-64):

1/ "placing issues on the global agenda" (31) as a common goal of the GPP networks;[67]

2/ "negotiating and setting standards and regulations" in response to the pressing demand for global frameworks for the emerging "transnational social and economic spheres of activity" (36);[68]

3/ "developing and disseminating knowledge" is a generic function of all networks;[69]

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[66] The stakeholder concept, as originally developed in Organization Studies, is presented in Chapter 2.3.

[67] According to the Report, the "transnational advocacy networks" are specifically engendered to press states and international organizations to address particular policy issues and "adopt certain measures" (i.e. International Campaign to Ban Landmines, International Coalition to Stop the Use of Child Soldiers, the international debt-relief movement, led by Jubilee 2000, Transparency International, the Network on the development of Guiding Principles for Displacement – 32-35).

[68] Among the relevant examples are the World Commission on Dams, Apparel Industry Partnership, International Standardization Organization (ISO 14000) (36-47). "Such networks… are more likely to arise out of a crisis or stalemate, when those in conflict realize that no single group can resolve the issue by itself" (Reinicke and Deng, 2000, 36). Arguably, ICANN's mandate places the corporation among those entities.

[69] For some networks, providing informational space (i.e. Internet web sites) for sharing best practices and solutions constitutes their *raison d'être* (i.e. the Consultative Group on International Agricultural Research,

4/ "making and deepening markets" where they are lacking, or where they are not producing "certain goods whose provision would be in the broader public interest" (52);[70]

5/ "implementing ideas and decisions" as a common goal;[71] and

6/ "closing the participatory gap" as a process dimension in the GPP network's mandate. This is achieved by facilitating "social interaction among people and organizations" (62) that subscribe to opposing views on a particular policy issue and creating trust across national borders, sectors and ideological camps.

Addressing this last "intangible outcome" of the GPP network functioning, Reinicke et al. (2000, 62) trace the potential long-term contribution of these entities to "the formation of social capital" and the constitution of a global public space.[72] They notice that, by enabling shared knowledge and learning, these networks, in fact, engage in "capacity building" for local communities, especially in developing countries, "to take democratic control over their destinies" (64).

In a rather optimistic tone, Reinicke (1999/2000) infers that, by building a membership of stakeholders with often conflicting perspectives, "tap[ping] information and expertise from a variety of backgrounds" is allowed, "giving voice to previously unheard groups" occurs, and "a more complete picture of particular policy issues" is composed (46). A network's mission is "to sort through conflicting perspectives", "hammer out a consensus, and translate this consensus into actions": "The value of a consensus-building network rests… on its creation of an environment that enables parties

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which was launched still in 1971, the Roll Back Malaria Initiative, the Urban Management Programme – 47-52).

[70] For such organizations as the Medicines for Malaria Venture, networks for microlending of small loans to poor individuals and small businesses to combat poverty this is a constitutive function (53-57).

[71] Some networks, though, specifically take on the task of implementing international treaties that address transboundary problems (i.e. Global Environment Faculty, the Chemical Weapons Conventions – 57-61).

[72] This observation supports the argument presented in this thesis that the multistakeholder consensus entities constitute power-generating sites, which produce long-lasting social effects (see Chapter 2.3).

in conflict to reach an eventual agreement" (47). As a characteristic feature, stakeholder inclusiveness lends legitimacy to the networks' process and increases the chances of successful implementation of the policy outcomes.

Nonetheless, Reinicke contends that, despite their advantages, these networks are seen as only complementing the existing global governance institutions, and not contributing to a "'power shift' away from governments and international organizations toward civil society and the private sector". They have emerged "to address cutting-edge global challenges" and help the formal institutions to manage risk (51). In this light, national governments, international organizations, and especially the UN agencies are advised by the authors of the UN Vision Project on Global Governance Report to take the leadership in supporting this "quiet revolution". Because of their special task of mediating at a global level between states, business and civil society, international organizations are seen potentially as 1/ convening new GPP networks, 2/ "providing a platform, a level playing field for negotiations" (98), and a "safe place", 3/ proposing political high-profile leadership in the initiation phase, 4/ advancing norms by "using networks as platforms" (99), 5/ serving as "multilevel-network managers" (99), and 6/ financing new GPP networks (Reinicke and Deng, 2000, 96-103).

The Report, in fact, goes as far as claiming that "the future of GPP networks is the future of the United Nations, and vice versa" (2000, 93), because working in and with these networks is a matter of "operational imperative" for the United Nations and not just a policy choice. The recommendation to the UN is "to call for a global dialogue" (94) based on a recognition of "the systemic transformations of the international system" (93) and directed towards the evolving of "a strategic vision" on the organization's

involvement within 1/ "strengthen[ing] and consolidate[ing] existing networks" (94), 2/ "build[ing] implementation networks", and 3/ "launch[ing] new networks where they are needed" (94).

Overall, the analysis of the decision-making practices of a number of existing GPP networks has prompted the group of researchers led by Reinicke to conclude that "we may well be in the early stages of a paradigm shift (in Thomas Kuhn's sense) in the area of governance" (2000, 116).

Reinicke's model provides a valuable analytical support to the argument that alternative policy responses are needed, which are compatible with both, the globalization's scope and complexity, and the mechanics of the powerful global trend of redistribution of power. Nonetheless, the global public policy model does not account for the "shared power" dynamics in a multistakeholder collaborative decision-making process. This explains some of the contradictions and incorrect assumptions in Reinicke's analysis.[73]

As discussed in the next section, the possibility of an inclusive, deliberative mode of policymaking in a problem domain, from the local and national to the global level, requires both a more profound understanding of the power dynamics in a collaboration, and skillful managing of the consensus-oriented negotiations. A number of conceptual constructs developed under Organization Theory have already been probing the

[73] The author's rather optimistic assumption, for instance, that "public-private partnerships initiated by invoking horizontal subsidiarity will also produce a more efficient and effective policy process" (1998, 90) must be tempered by the reality of the multistakeholder collaborative process. As some scholars notice, "shared-power arrangements... usually are difficult-to-implement-and-manage responses to very difficult problems" because the consensus-oriented process is rather slow, full of compromises, tension-laden, and often requires a mediator's intervention (Bryson and Einsweiler, 1991, 10).

incentives and the outcomes of collaboration, mainly in business settings, but in hybrid multistakeholder alliances, as well.

2.3. Organizational perspective: collaboration as a mode of shared power

So far, we have developed two layers of the conceptual model of power that this thesis requires. First, in ontological terms, power emerges as a relational and ubiquitous phenomenon that is capable of producing effects/outcomes (i.e. discourses, institutions, knowledge, policies, structures, etc.). It is discernible in the webs of force relationships, where it produces both negative and positive outcomes. Second, in political terms, new socio-economic dynamics, grasped by such metaphors as Globalization, Information/Knowledge/Network Society, have induced a significant shift in the perceived balance of power on both national and global levels, and between national governments (and international organizations) and private actors (the "shared power" formula). In response, new forms of alternative policymaking emerged, which are designated as "collaborative formations", in Organization Studies, and "global public policy networks", in Political Science.

The invention of new organizational and institutional forms (i.e. global public policy networks) in response to these dynamics is celebrated by "globalists" as directing the policy-making process towards the ideal of cosmopolitan and participatory democracy, while enhancing the implementing power of the existing and emerging global regimes.

The novelty of the phenomenon of global public policy networks, though, should not cloud the fact that a multitude of collaborative formations, functioning on the principle of "shared power", have been convened, since the 1970s, mainly in the U.S.A., on local, regional, and national levels. Consequently, the phenomenon of "collaborations" or "collaborative alliances" (Gray, 1989; Wood and Gray, 1991), or multistakeholder collaborative roundtables, in Canada (Pasquero, 1991; Turcotte and Pasquero, 2001) has been an object of vigorous investigation by Organization Studies theorists for the last two decades.

As the present thesis is concerned with 1/ the power dynamics, which characterized the conditions of possibility in which ICANN was conceived and which ruled the stakeholders interaction in the Corporation, and 2/ the generated creative power of the policymaking process, crossing the border of the Organization Studies is required. As demonstrated further, the rich arsenal of conceptual tools that has been developed in this field enables a process-oriented approach to the ICANN case, where the productive potential of power relations is exhibited.

In this sense, the reapplication of models, classifications, concepts, and definitions, which have been accumulated by the analysis of mainly "local"-level collaborations, to the investigation of ICANN as a global public-policy network, emerges as a viable and promising strategy.[74] It would, as well, bridge two disciplinary fields in Social Sciences, namely, Political Science (more particularly, Globalization Studies) and

[74] Indeed, already in 1989, Gray observed that "[t]he potential for collaboration in international affairs also appears promising" (7). Interestingly, among the salient issues, she included "a variety of property rights issues related to the use of the seas and exploration in Antarctica, global environmental issues such as the future of rain forests and control of acid rain, and transnational technology issues such as the management of international telecommunications. For problems of this scope, international collaboration is essential for finding solutions" (8).

Organization Theory, which, apparently, have not been communicating so far on the "shared power" collaborative phenomenon.

2.3.1. Evolutionary dynamics in Organization Studies

Following an evolutionary trajectory from micro- (the firm) to mezzo- (interorganizational relations) to macro-level objects of investigation ("organization" as a generic activity), Organization Studies have developed a rich, yet somewhat eclectic tool-box of theories and concepts.[75]

When Organization Studies was established as an academic field (mid-20th century), its subject was defined under the decisive influence of Weberian sociology: formal organizations (i.e. industrial firms) and organization structures were constituted as the legitimate primary concerns of the theorists.

This "single-minded preoccupation" (Tsoukas, 2003, 609) began crumbling in the 1970s, under the French structuralists' (linguists and political philosophers) alternative ontology. Chia (2003) observes that theoretical emphases and research priorities have shifted to process, indeterminacy, flux, interpenetration, and formlessness (the "becoming ontology" - 128); to "language and in particular the activities of *naming* and symbolic *representation*", to "the ideas of reminiscence, resonance, recursion, and resemblance"

[75] In a number of ambitious attempts toward the consolidation of the field, a consensus has emerged on the following distinct dynamics of the field: 1/ diversity of epistemological sources; 2/ diversity of approaches and theoretical constructs; 3/ rapid proliferation of new theories; and 4/ lack of communication among the theoretical schools. As a result of the above-outlined dynamics, "[o]rganization theorists from one school will quote and cite each other's works regularly. However, they usually ignore theorists and theories from other schools – or acknowledge them only negatively" (Shafritz. and Ott, 1992, 4).

(130 – emphases in the original). As a result, the focus of Organization Studies was redefined and research priorities were reframed (see Table 5):[76]

Table 5: Major shifts of emphases in Organization Theory

	"Classic" Organization Theory (positivism and interpretivism)	**Postmodern Organization Theory**
1/ Redefining the object of study	- the *behavior* of formal organizations and individuals in them, and their structural determinacy	- the *process* through which organizations are constructed and structure is generated, maintained and modified in the course of interaction
2/ Redefining "organization"	- "organization" is something solid, enduring, and standing in a causal relation to both human agency and its environment	- "organization", in a fundamental sense, is a "world-making activity"; "organizations", in a substantive sense, are "temporarily stabilized event clusters", "islands of relatively stabilized relational orders in a sea of ceaseless change" (Chia, 2003, 130)
3/ Redefining the theoretical priorities	- a/ the atomistic thinking that underpins modern science leads to the order of differentiation,	- a/ from atomistic to processual thinking, where "the individual elements have no real existence apart from the process of which they are but particular points of

[76] The following list of major conceptual shifts in Organization Studies is compiled drawing from Chia, 2003; Tsoukas, 2003; and Reed and Hughes, 1992.

	fragmentation, and representation; b/ "organization" is conceived as a legitimate object of knowledge in its singularity and closeness	emergence" (Chia, 2003, 133); b/ from a single organization as a unit of analysis to "organizational complexity and the unconscious" (134) as levels of awareness; c/ "the logic and technology of societal ordering" become "central preoccupations of the postmodern organizational analyses" (135).

These ontological shifts account for the "significant conceptual progress" in the field, in terms of "recognizing that organizational phenomena are embedded into, and derive their significance from, broader patterns of meaning and nexuses of activity"; "the apparent solidity of organizations is due to social processes at work"; and "individuals are inherently social and bodily creatures, and not mere self-interested information processors" (see Tsoukas, 2003, 609).

As a result, Organization Theory has begun unraveling the "real-life complexity" by 1/ enlarging the scope of analyzed empirical phenomena (i.e. the new network forms of organization, and patterns of interorganizational cooperation), and 2/ embracing the notion of "self-organization". The latter signifies the shift "from thinking of organizations as exclusively imposed from the outside to seeing "organization" as an immanently generated order" (Tsoukas, 2003, 610).

2.3.2 Investigating interorganizational relations

Traditionally, "research on organizations has been concerned... with *intra-organizational* phenomena" because, as Evan explains, organization has not been taken "in its environment as a unit of observation and analysis" (Evan, 1993, 142). In the 1960s and 1970s, though, theoretical enquiries became sensitized to the organization-environment relationship as "systems theory", which allowed organizations to be conceived as open systems, and "resource-dependence theory" suggested the existence of interdependency among organizations.

Influenced by this intellectual environment, William Evan (1966) proposed a theory of interorganizational relations based on the "organization-set" structural model, which considered a "focal" organization, related to other organizations, as the unit of analysis.

A decade later, Eric Trist (1977) introduced the concept of "organizational ecology" as related to interorganizational relations.[77] The term "organizational ecology" referred to "the organizational field created by a number of organizations whose interrelations compose a system at the level of the whole field" (316). Thus, this field, as a system, becomes the object of inquiry. As constituted by Trist, the organizational ecology perspective is focused on the processes of domain development, rather than on the structures.

Key in the organizational ecology perspective is the notion of turbulence, although it has never reached the status of a concept. It was presented by Fred Emery and

[77] Significantly, Trist's analysis was based on first-hand observations of the collaborative process in local alliances in the U.S., still in early 1970s.

Eric Trist (1965) as a "pervasive quality" of the "contextual environment" of organizations: "In a turbulent field, uncertainty is raised to an altogether higher level than the existing underdistributed-reactive conditions. This is a direct consequence of the greater complexity of, and interdependence[78] among, the immense number of activities making up the causal texture of the contextual field" (Emery and Trist, 1992, 321).

Under conditions of turbulence, collaboration emerges as the winning alternative to competition, and, instead of bureaucracies, collaborative arrangements are invented. "They involve the evolution of a negotiated order, founded on collaboration rather than competition" (Emery and Trist, 1992, 318). The collaborative relations allow a researcher to think in terms of "organizational domain", to which an organization belongs. Thus, in a decisive shift of focus from the individual organization to its "domain" of relationships, Trist opened the field of collaboration investigations. Now it was conceivable to magnify "process" over "structure" and to refer to an organization as a stakeholder in an organizational domain.

According to Trist, organizational domains can be classified in the following way: 1/ domains where one of the existing organizations becomes the "referent organization"; 2/ domains where, on the basis of an alliance, a new organization is created without allowing a particular constituent organization to dominate the alliance; and 3/ domains, which do not require structure but function through cultural conventions (as a network).

In regard to the ICANN case, as presented further, the second class of domains provides a specific reference point, as, by definition, all organizations belonging to the

[78] As Wood and Gray (1991) explain, "[i]nterdependencies are created because organizations possess or control vital resources (material, human, political, structural or symbolic) and thus are the source of environmental pressures for one another. Organizations seek to reduce these pressures and manage interdependencies by gaining control over crucial resource supplies, thus reducing the uncertainty of gaining those supplies" (156).

domain are represented (the notion of stakeholders), which enables the new organization to build consensus among the members. As a result, significant dynamics are altered: "A system designed on these lines might be expected to strengthen and make more self-regulating the idle ground of society, absorbing some of the turbulence generated at the macro level and buffering the micro organizations" (Emery and Trist, 1992, 325).

2.3.3 Other key concepts in the Interorganizational Relations field

Both concepts – of organizational ecology and organizational domain – suggest that the private interest of a firm, in principle, coexists with the interests of other "players" in a domain. In effect, this is a significant shift in focus from the individual organization, and its internal philosophy, to the societal level of interaction and outcomes. In this shift, two important concepts emerged, in the 1980s and early 1990s, which defined partnering organizations as "stakeholders" and established the democratic principle of "shared power" as the foundation of stakeholder collaboration.

- **The stakeholder theory**

The notion of power-sharing among a number of stakeholders was preceded by the realization that the modern large-scale corporation, which had come to dominate the Western economies by the late 1970s, had to develop strategies to cope with the turbulent forces that were often out of its control. In this context, the notion of stakeholders, in contrast to the more limited term "stockholders", was conceptualized in the "stakeholder theory of the firm".

From a corporation's point of view, stakeholders are "all those interest groups, parties, actors, claimants, and institutions - both internal and external to the corporation - that exert a hold on it. That is... who either affect or who are affected by a corporation's actions, behavior, and policies" (Mitroff, 1983, 4). As this definition suggests, the rudimentary notion of stakeholders was limited, initially, to a number of potentially "powerful interests" that a corporation needed to identify, study and take into consideration in its decision-making.

The stakeholder theory of the firm redefined organization as "the entire set of relationships it has with itself and its stakeholders" (Mitroff, 1983, 22), because of the mutual influence between each stakeholder and the organization. This allowed moving away from the linear vision of a firm's relations with its stockholders and customers to a more complex map of network-like interdependencies. Thus, Ian Mitroff infers that "there is a network of interdependent *relationships* among all stakeholders". Hence, "[t]he state of an organization at a certain point in time will be the result of the interaction of the behavior of all the organization's stakeholders from the beginning of its history up to a particular point in time" (38).

Among the properties of each stakeholder are: purposes and motivations; beliefs; resources (material, symbolic, physical, positional, informational, skills); special knowledge and opinions; commitments (legal and otherwise); relationships to other stakeholders in the system by virtue of power, authority, responsibility, accountability (36).

With the emergence of interorganizational collaborations (in the 1970s and 1980s), the notion of stakeholders, inevitably, broadened to encompass their decision-

making capacities, the power dynamics of their interactions, and the constituencies they represented. The above-presented stakeholder theory, though, has not been developed further. In Donna Wood's and Barbara Gray's (1991) interpretation, the reason, partially, is that "it has not been able to look past the focal organization to map and evaluate relations among stakeholders that affect – but are not the result of – actions taken by the focal organization" (160).

Nonetheless, this attempt to theorize a firm's external and internal force-relations and adequate strategies for managing turbulence is significant with its multidisciplinary approach and the introduction of the network imagery to Organization Studies. Indeed, the stakeholder term allowed the explanation of a cluster of emerging phenomena, such as the increased interdependency and interconnectedness, and the proliferation of collaborations for consensus building.

- **The Shared Power concept**

The global governance perspective, which was presented in Chapter 2.2., assumes the existence of interconnected policy arenas, where multiple social actors participate in the decision-making process on the merits of their perceived stakes and proven competencies. In the 1990s, following the proliferation of new hybrid organizational forms, especially in the field of environmental policy, a number of authors in Organization Studies and Management Studies turned to examining the interconnected policy arenas. The aim was to overcome the single-focus approach to situations in which organizations and individuals must share power and authority. It was recognized that "[a]s more and more sharing relationships develop out of necessity, there is an urgent

need for reflective practitioners and scholars to examine more closely the nature of shared power and how it can be used effectively, efficiently, justly, wisely and with due regard to individual liberty" (Bryson and Einsweiler, 1991, "Preface").

Jeffrey Luke (1991) suggests that "[i]nterconnected policy arenas are more accurately characterized by [the metaphor of] shared power" (40).[79] The reason for the constitution of "interdependent ventures", as Nancy C. Roberts (1991) explains, is that "no one actor has the required resources to accomplish the desired ends" (103). Organizations, as representing different stakeholder constituencies, come together to share activity, trust, planning, decision-making, and power in order to tackle a problem, make decisions, or create projects. What is not shared is authority.[80] While the organizations are conscious of the fact that they cannot achieve acceptable outcomes through unilateral action, they reserve the right to withdraw if unacceptable developments emerge through the sharing of power. Thus, the collaborative process (which is often slow, time-consuming, and full of compromises) is justified as a viable decision-making approach by its high probability of achieving legitimate mutually beneficial outcomes.

In literature, "shared power" is defined (after Giddens) as "*shared transformative capacity* exercised in interaction between or among actors to further achievement of their separate and joint aims" (Bryson and Einsweiler, 1991, 3 – emphases in the original). As

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[79] Despite the political origin of the category of power, one finds attempts to conceptualize shared power in Organization Studies, and not in the contemporary democratic theories. As George H. Wood (1991) states, "current democratic theory and practice are locked within a protectionism rationality" that favors "limiting participation in the governing process to the elite" (170).

[80] Two remarks are due here. First, authority, by definition, is the legitimate form of power. If power, treated as a specific resource, as it is in Organization Studies, is shared, then authority should be susceptible to the same dynamics. Thus, there is a conceptual confusion in the above statement. Second, it can be argued that authority is accumulated in partnership settings (as an instance of the thesis of this project that collaboration establishes power-production sites). Stakeholders (government agencies, business corporations, or NGOs) contribute to the success of the policy process by bringing in their specific authorities (consider the constituencies behind them). In turn, authority accumulated by a stakeholder entity through collaboration guarantees the acceptability of the policy decisions and the achievement of self-regulation.

the above definition suggests, although the shared-power concept assumes a collective perspective on power (Roberts, 1991, 104), it still accentuates exclusively the individual organizations' capacities to influence the collaborative process (power-as-possession perspective). But, if power is to be considered (after Foucault) as a productive network of relationships, the proposed interpretation is rather limiting, and even deceiving.

As our further examination of the ICANN case suggests, collaborative arrangements are power-production sites, nodes in the web of force relations, accumulating, generating, and radiating transformative impulses to the larger social environment. In this sense, I argue, the ICANN case should be read as an arena, which has been generating transformative social energy at the crossroads of a number of power vectors.

2.3.4. Theory of collaboration

It has been only in the last two decades that the literature on interorganizational relations began providing some insight into the dynamics and evolution of those relations. [81] This coincided with the increased pursuit of collaborative decision-making by private- and public-sector organizations.

Consequently, 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

[81] The investigations of innovative decision-making processes in Organization Studies are still characterized by descriptive and classification attempts. In fact, most of the empirical research in Interorganizational Collaboration has been used to develop a practice-oriented theory into the management of collaborations; hence, the prescriptive aspect of these publications.

behavior and political science, and departed from the traditional model of interorganizational relations that had hitherto dominated the literature.

As a first step in this direction, Barbara Gray suggested that collaboration was not simply a method of multiparty dispute resolution, but it was enabling organizations to manage their increasing interconnectedness (226).

2.3.4.1. Diversity of collaborative alliances

Gray (1989) distinguished "collaboration" as an emergent interorganizational process from "collaborations" as negotiated orders.[82] As "quasi-institutional mechanisms" (235), collaborations serve to accommodate differing interests within society and coordinate interorganizational relations.

In a collaboration, stakeholders "constructively explore their differences". The aim is "to create a richer, more comprehensive appreciation [common understanding] of the problem... than any one of them could construct alone" (5), and resolve conflicts, or advance shared visions on the collective good (5).[83]

As Gray noticed, dissatisfaction with the status quo and the desire to avert unwanted costs that it induces constitute the major motivation for the principal stakeholders to turn to collaboration. There are stakeholders, though, who would be prompt to join a collaboration because of the attractive cultural norms it embodies

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[82] Gray (1989) defined "negotiated order" as "a social context in which relationships are negotiated and renegotiated. The social order is shaped through the self-conscious interactions of participants" (228).

[83] Finn (1996) states, for instance, that collaboration is perceived in Organization Studies as a "fundamentally new public policy approach to understanding and dealing with issues that are larger than the capacity of any one actor or organization is able... to comprehend or deal with" (152).

(consensus decision-making vs. top-down governmental regulation), or the credibility of the convening party(ies). Thus, the expectation that through collaborative efforts some positive outcomes would be produced is a powerful incentive for participation in a collaboration.

Gray developed a framework for classifying collaborative designs on the basis of 1/ what has induced a collaboration – a conflict or a shared vision concerning a domain, and 2/ what the intended outcome is – information exchange or producing "binding agreements", which could be either in the form of "recommendations to an agency" authorized to implement them or a formal commitment among the stakeholders to authorize implementation (180) (see Table 6 - source: Gray, 1989, 179).

Table 6: Designs for collaboration

	Expected Outcome		
Motivating Factors		**Exchange of information**	**Joint agreements**
	Advancing a shared vision	*Appreciative planning* - Search conferences - Community gatherings	*Collective strategies* - Public-private partnerships - Joint ventures - R&D consortia - Labor-management cooperatives
	Resolving conflict	*Dialogues* - Policy dialogues - Public meetings	*Negotiated settlements* - Regulatory negotiations - Site-specific disputes - Mini-trials

In the above grid of collaborative designs, ICANN can be placed in the group of negotiated settlements ("regulatory negotiations"). Indeed, considering the tensions linked to allocating property rights that preceded ICANN, and the reciprocal expectations of a regulative regime for the domain, it can be suggested that ICANN belongs to the conflict-resolution motivated initiatives, which are directed towards producing binding agreements in an especially created institutionalized arena, where a multitude (but not all) of stakeholders has been discussing the regulation of the domain.

The convener – the U.S. DoC – was powerful enough to assemble the collaboration and control its dynamics (timetable, agenda, structuring) without formally participating in the discussions.

The theory of collaboration suggests, as well, that a successful collaboration undergoes three major phases (see Gray, 1989, 57):

1/ Problem-setting stage, which includes identifying the stakeholders and recognizing their legitimacy, producing common problem definitions on the issues that join them, and agreeing on conducting face-to-face negotiations to address these issues. This is the stage in a collaboration where the stakeholder interdependence is recognized and acknowledged.

It is up to the convener to design the collaboration as an open or closed forum for deliberations. Nevertheless, Gray suggests that the following parameters should be considered when the issue of the participating stakeholders is discussed:

a/ a collaboration should consists of these stakeholders "whose expertise is essential" (64) to reach complete understanding of the problem (usually, these are the stakeholders who will implement the consensus decisions);

b/ the process of identifying stakeholders should be led by the consideration to determine who has "a legitimate stake in the problem" (66); disputes over stakeholder's legitimacy often need to be mediated by a third party before the discussion of substantive issues begins;

c/ it is essential that stakeholders believe "the convener has legitimate authority to organize the domain" (71), namely, "convening power", which derives from "holding a formal office, from a long-standing reputation of trust with several stakeholders, or from experience and reputation as an unbiased expert on the problem" (71). If the convener is suspected of bias, or self-interest, "other stakeholders may refuse to participate or even try to subvert the collaborative attempt" (72).

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. The overall concern is with "securing enough resources to ensure that stakeholders may participate equally in the proceedings" (73).

Gray cautions that "unless these tasks are accomplished during problem setting, subsequent efforts to prepare for and engage in negotiations will be hampered" (74).

ICANN's experience provides evidence for the significance of the preliminary dynamics. The U.S. government, in its capacity as the convener of the collaboration on the Internet DNS management privatization, 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 a constitutive agenda of substantive policy issues. The publication of the U.S. DoC Green Paper (January 1998) and, consequently, White Paper (June 1998) on this privatization policy motivated the stakeholders to participate in the collaborative process, through the Internet Forum for the White Paper (IFWP), aiming at creating a private corporation with regulative power in the field.

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 itself as the guardian of the public interest in a trusteeship organization, it vigorously opposed the at-large participation on an equal basis. Ultimately, the representative power of the at-large users was curtailed.

2/ Direction-setting stage, which consists of working on organizational and substantive policy issues (Gray enumerates the following components – "establishing ground rules, setting agenda, organizing subgroups, joint fact finding, exploring options, and reaching agreement and closing the deal" - 74). This is the stage where values are articulated, interests are identified and juxtaposed, and "a sense of common purpose or direction" emerges (74). As Gray (1989) puts it, "during direction setting each side develops a realistic understanding of how the other stakeholders view the issues and what their interests are" (75).

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.

Creating task forces to explore issues and present recommendations for addressing those issues to a larger plenary group (or, in the ICANN case, to the Board), is a popular form in collaborations. In addition, subgroups (in the ICANN case, "working groups") can be created for a similar purpose.

The process of negotiating options begins with "establishing the facts", which should be considered in developing the problem definition and alternative solutions. Understandably, where complex technical problems are concerned (i.e. ecological or technological policy issues), the perception of risk could prevent the stakeholders from reaching an agreement on solutions. Yet, Gray suggests that, if a satisfactory process for monitoring outcomes is agreed on, the parties would realize that "pushing for the specific technical outcome is secondary or unnecessary" (83).

During the direction-setting stage, the role of a "third party" or a mediator is crucial. From assisting in information search, or even doing research "at the behest of the negotiators" (83), to helping to forge acceptable options "through private conversations with each coalition of interest" (84), to initiating a draft proposal, which is circulated among the parties to "amend it until it is acceptable to everyone" (85), and to using "shuttle diplomacy" to enhance closure when "parties are reluctant to commit to an agreement" (86) – these are all techniques in a mediator's arsenal for forging consensual decisions.

Nonetheless, the accumulation of support for a particular option is supposed to occur in the subgroups and plenary discussions, because "[r]eaching an agreement means

gaining commitment of all the parties to a single option or to a package of options" (Gray, 1989, 85).

Guided by the above description of the direction-setting stage, it can be inferred that the negotiations in ICANN, in principle, did not benefit from the neutrality[84] and professionalism of a "third party" or a mediator. Initially, encouraged, apparently, by the success of the self-organizing effort of the stakeholders (the IFWP), the convener – U.S. DoC – left the consensus-building effort on a number of issues 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.

3/ Implementation stage, which requires attention to "dealing with constituencies" (86), "building external support" (87), structuring and "monitoring the agreement and ensuring compliance" (91).

As Trist (1983) had done earlier, Gray accentuated the role of those organizations that have been created to oversee the implementation of the negotiated agreement – the so-called "referent organizations" (89).

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[84] Wood and Gray (1991) state that the term "neutral" in regard to a convener is "a particularly controversial term in the literature addressing multiparty dispute resolution". Nevertheless, "[a] convener's personal preference or biases may actually contribute to the convener's familiarity with the issue and not interfere with the collaborative process, as long as the convener is perceived by all parties as fair and open-minded" (152).

In effect, this "referent structure" is a system for self-regulation in a domain, which supports and sustains the stakeholders' collective appreciation, "a forum for future problem solving, and a regulative framework for the domain" (90). Nevertheless, a shift in direction is conceivable "once implementation is under way" and the stakeholders may decide "to renegotiate... some of the original provisions of the agreement" (91). Indeed, ICANN's mission was renegotiated (in 2002), and ICANN 2.0 emerged as a limited-scope technical-mandate regulator from the initial "establishing and regulating a new market" entity.

2.3.4.2. Enlarging and consolidating the Collaboration Theory

In an attempt to reapply the collaboration theory to large-scale societal problem solving, Jean Pasquero (1991) proposed the notion of solving "metaproblems" in supraorganizational collaborative formations.[85]

Pasquero defined "supraorganizational collaborations" as "loosely coupled, multilayered networks of referent organizations designed to lead stakeholders to take voluntary initiatives toward solving a shared social problem" (38). He saw collaborations as "embedded in power and value networks, which are themselves located within processes of constant flux and transformation" (56).

Pasquero's contribution to collaboration theory was part of an impressive attempt to consolidate the interorganizational collaboration field, redefine the guiding research

[85] Pasquero's research was based on the initiative of the Canadian government (1989) to address environmental protection via both a nationwide multiparty collaboration - National Roundtable on Environment and Economy, under the direct authority of the Prime Minister of Canada, and provincial roundtables, whose main purpose was to reach broad consensus on environmental protection.

questions, and provide the basis for "a comprehensive theory of collaboration".[86] As a result, "collaboration" was defined exclusively as a self-governance process: "Collaboration occurs when a group of autonomous stakeholders of a problem domain engage in an interactive process, using shared rules, norms and structures, to act or decide on issues related to that domain" (Wood and Gray, 1991, 146).

Particular importance was assigned to a convener's role in a collaboration. When collaboration is "requested by stakeholders", the convener is perceived either as "fair" (formal authority) or as "trusted" (informal authority). In the case where collaboration is initiated by a convener, the convener is either "powerful" (formal authority) or "credible" (informal authority) (152).

Applied to the ICANN case, these observations suggest that the U.S. 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 (U.S.) 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 particular national governments. Hence, although the U.S. DoC functioned as the convener of the ICANN collaboration, it was not initiated by the U.S. government, but was invented as a conflict-resolution forum in response to pressures in the organizational domain.

The comprehensive theory of collaboration proposed as well the model of convening through layers, where larger alliances are initiated and convened "by a smaller

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[86] Such a theory was outlined by Wood and Gray in *The Journal of Applied Behavioral Science* (1991), where, in two consecutive issues, nine research-based articles presented six theoretical perspectives applicable to the study of collaboration.

collaboration of stakeholders with common interests in the domain" (154). Indeed, the Internet Ad Hoc Committee, for instance, which was convened by the technical cadre (the Internet Society) in 1996, was a first-order collaborative alliance in the DNS problem domain. As our further analysis suggests, this alliance of stakeholder interests later dominated ICANN and disturbed the architecturally-intended power parity in the collaborative process.

As for the suggested configuration of stakeholders to be assembled, the theory of collaboration links success with the participation of a/ "those stakeholders... that are most interested in working collaboratively to solve a problem"; b/ "the most powerful or influential stakeholders"; c/ "the best organized networks of stakeholders... so that social pressure may be brought to bear on nonparticipants" and d/ in principle, "the majority of stakeholders in a problem domain so that social norms can be established that pressure others to participate eventually" (Wood and Gray, 1991, 155). Significantly, the absence of some stakeholders within ICANN was seen as undermining the legitimacy of the process, among other impediments.

2.3.4.3. Power dynamics in a multistakeholder collaboration

Gray's Theory of Collaboration (1989) was inspired by the real shift in the public-policy regime - from the kind of unequal distribution of power associated with representative democracy to a more accessible, inclusive and collaborative decision-making process. As discussed previously, this theory was 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.

To advance the view of a collaboration as a power-sharing forum and a viable public policy alternative, Gray distinguished it from three other "models of political behavior" (113): 1/ pluralism, where power is equated with influence over decision-making bodies; 2/ elitism – power as control over the decision-making process, and 3/ control of consciousness – power as hegemony. Although finding collaboration to be similar to pluralism, she infers that the former represents an improved model of decision-making, especially with consideration of the public good (118).[87]

The shared-power model, which Gray proposed, is based, nevertheless, on the conventional "power-as-possession" understanding. Reflecting on the dynamics in a number of real-life collaborations, this model puts an emphasis on the need of certain power parity in a consensus-seeking process. Thus, first, "the parties must in some ways be dependent on each other", and "must have some form of countervailing power" (119). This would prevent particular interest groups from imposing their proposed solutions on the other affected stakeholders; second, "the weaker parties must first develop their capacity as stakeholders" and "establish some form of countervailing power" (119);[88]

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[87] Gray's argument (1989) is that, first, "consensus on the public good" can be reached, since, generally, parties to a collaboration are dissatisfied with the status quo, and "the alternative of taking no action is clearly worse for all concerned"; second, the stakeholders, "in addition to elected officials assume responsibility for searching for the collective good - no one party attempts *a priori* to discern or promote the nature of the collective good"; third, "a wide array of interests is explicitly included in, rather than excluded from, the deliberations to enhance the possibility of reaching a consensus on the public good"; fourth, the multistakeholder interaction changes the process "by which the parties exert influence over one another"; thus, "the chances of discovering a mutually beneficial accommodation" are increased (118).

[88] Gray insists that certain "level of intervention is required if parties are to move from the low-power dynamics of latent conflict to become legitimate stakeholders" (119). In effect, this is a process, where "rights to express a grievance" and to participate in deliberation are recognized. In this sense, the efforts to create regional at-large structures in ICANN 2.0, as outlined further, should be seen as leading to developing stakeholder capacity in the Internet users' milieu.

third, in order to "disperse power" to a wider group of stakeholders, conveners must incorporate a wide array of parties in the deliberations, "any party that has relevant information about the problem and/or the potential to block an agreement, should they decide to muster their resources" (120); and, fourth, third parties can help the stakeholders appreciate each other's power and direct this power toward constructive solutions.

The multistakeholder deliberative formations, though, are not immune to attempts to influence the policy outcomes. In fact, power dynamics are observable in each phase of collaboration. Still in the problem setting stage, power dynamics are conditioned by those "who define the nature of the problem" (121) (the conveners), for they decide how to address it, "what actions will be taken with respect of solving it", and even who will participate and in what forum the deliberations will occur. Conveners, themselves, derive power from both their ability to influence outcomes in the domain (through their expertise, resources, and links to legitimate authorities) and the credibility they have with other stakeholders ("perception of objectivity or bias" - 126).

As Gray infers, conveners, in effect, "make political decisions about who can use the collaborative process to influence the domain" (126). In "underorganized" domains, in particular, where "there is no existing forum for addressing the problem, or the existing forum is not amenable to multiple stakeholders", convening the stakeholders to collaborate becomes "a process of creating boundaries", and this is "a highly political activity" (124): "Identifying and selecting stakeholders to collaborate, in effect, circumscribes the boundaries of the domain and empowers a specific group to address the

problem. The power of conveners, then, is the *power to organize*" (124 - emphasis in the original).[89]

During the direction-setting phase, power dynamics emanate from control over both defining an agenda for the domain and determining the range of mutually acceptable solutions ("power to strategize"). In regulatory negotiations, the regulatory agency shares "power to strategize" with other stakeholders in the process of creating policy.

Consensus is recognized as the primary objective of a collaborative formation. In fact, the ability to achieve consensus justifies the multistakeholder collaborative process as a valuable power-sharing policy mechanism. Consensus is sought in regard to all three types of issues discussed: substantive, procedural, and communicative. By definition, consensus-building begins with developing common domain definitions or shared values. The goal is to reach commonly accepted solutions for the discussed problems, or, as it is often said, decisions, all stakeholders can live with.[90]

From observation of the process in a Quebec regional environmental roundtable, Marie-France Turcotte and Jean Pasquero (2001) discerned a paradox: the possibility of reaching consensus was negatively influenced by the high level of stakeholder diversity, as the latter increases the risk of the process falling into deadlock. As they put it, "[t]he paradox is that the very requirements that make MCRs [multistakeholder collaborative roundtables] desirable and workable also are their most stringent limitations" (460).

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[89] Gray (1989) underlines the importance of all this because, in the early phases of a collaboration, "the boundaries of the problem domain are sufficiently unstable, ambiguous, or contested that the relative distribution of power among potential stakeholders is often largely unknown and untested" (121). As she observes, "interactions during problem setting have the potential to shake up entrenched power dynamics and to restructure existing power relationships with respect to the domain in question. They do this through the power to mobilize and the power to organize the stakeholders of the domain" (126).

[90] In his analysis of the Canadian environmental roundtable case, Pasquero (1991) infers that, "[a]s long as conflicting stakeholders cannot integrate the perspectives of their adversaries into their own rationales, progress in reaching consensus through a collaborative effect will be difficult" (56).

Although consensus could be achieved only on general or ambiguous objectives or definitions, consensus-seeking does play a valuable role: "it gives direction to an otherwise totally fragmented domain". As the authors suggest, "[t]he key is to preserve some amount of ambiguity in the definitions and the solutions so that consensus can emerge, even under various interpretations" (461).

Acting on the above inferences, the interrogation of the Internet DNS privatization case focuses on how decisions were taken by consensus, and why they were formulated and communicated in a certain way. As the further analysis demonstrates, this approach opens the power-dynamics "black box" for identifying 1/ the authorship of the alternative solutions, 2/ the reasoning behind the dominant policy discourse, and 3/ the options that have been left in the "non-decision" area.

2.3.4.4. Collaborations as power-generating sites

Cumulative observations have led scholars in Organization Studies to the inference that, along with programs, regulative decisions or regimes (tangible outcomes), the multistakeholder collaborative process produces consensus, learning and innovation, which constitute its intangible outcomes. This realization suggests, I would argue, that collaborations can be interpreted not only as power-sharing forums, but as power-generating entities, as well. Indeed, outcomes are deposits of transformative social energy, since the aim of a collaboration is to reconstitute a number of social relations in a particular problem domain.

I would argue further that, when cast as a power-generating process, multistakeholder collaboration exhibits long-term and large-scale societal implications.[91] Thus, the cumulative effect of a collaboration radiates on a number of levels (e.g., individual participants, constituencies, participating organizations, the domain, global interdependencies). It induces new structural relationships among a multitude of players (e.g., contractual and unofficial alliances), while stabilizing existing force relationships or engendering a network of new dependencies in a particular domain. Referring to all this as "changes in the distribution of social power", Pasquero (1991) suggests that, in this light, "power should be seen as a social stake in itself" (57).

In the same vein, Wood and Gray (1991) conclude that "[a]lthough collaboration may make environments more predictable in some respects, they also cause new dependencies to be created, thus *increasing* environmental complexity and turbulence... and concurrently reducing participating organizations' control over the environment" (158 – emphasis in the original). The logical question that they discern is "why – or how – organizations come to view trading one set of interdependencies for another not as a threat, but rather as a useful tool for meeting their objections" (158). Although, as they state, there is not yet a theory to explain this paradox, a plausible explanation, I would

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[91] Among the authors who investigate the dynamics of collaborative arrangements, there is an understanding that evaluating the success of a particular alliance should consider both tangible and intangible outcomes. The former include: formal agreements, policies, new regulations, or proposals for voters or public officials to consider. Among the latter are: social, intellectual, and political capitals. As Innes and Booher (1999) explain, in general, participants in collaborations report that they have established "new or stronger personal and professional relationships and built up trust which allowed genuine communication and joint problem solving. With this *social capital* they felt less hostile to others' views, were more likely to share knowledge, and were likely to negotiate other potentially conflicting issues. In most cases, stakeholders also built shared *intellectual capital*, including mutual understanding of each others' interests, shared definitions of the problem, and agreement on data, models, projections, or other quantitative or scientific descriptions of the issues. Once participants internalize such knowledge, it influences them even more powerfully, helps to coordinate action, and reduces areas of conflict... Finally, stakeholders develop *political capital* and begin to work together outside the consensus building process to influence public actions in ways they were unable to when acting individually" (4 - emphases added).

suggest, can be found in the above-described intangible outcomes of learning and innovation, which enhance an organization's capability to adapt to constantly shifting power networks.[92]

In the literature on the multistakeholder collaborative outcomes, achieving consensus is considered *the* success factor of a collaboration. In deliberations, problems and norms are redefined, ideally, by taking into consideration the concerns of all represented stakeholders. That is why the success of a collaboration depends on the necessary diversity of the perspectives, because it represents the diversity of interests, expertise, and potential solutions existing in the domain.

In the literature on multistakeholder collaborative process, learning is defined as acquisition of new information, its integration into an old interpretative framework and, consequently, the redefinition of the problems and the goals (Turcotte, 1997, 48). Through information exchange, the participants have the opportunity to, first, understand each other's perspectives and fields of expertise; second, learn about the social structure of the domain, and, third, acquire new social skills regarding how to collaborate within the network of relationships, how to argue a point (in "promotional" mode, and not "assertive" one) (see Turcotte and Pasquero, 2001, 457 – 458).

As an outcome of the collaborative process, innovation is defined, on the other hand, as the ability to both generate new ideas through redefining the problems, and craft possible solutions. Thus, Turcotte defines innovation precisely in relation to learning: "L'apprentissage en boucles doubles refere a la situation ou les informations nouvelles,

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[92] Huxham defines this as "collaborative advantage", a term that refers to the potential of interorganizational collaborations "to achieve outcomes that could not be reached by any of the organizations acting alone" (Huxham and Vangen, 2000, 1; see also Huxham and MacDonald, 1992; Huxham, 1996).

plutôt que d'être intégrées dans un schéma d'interprétation ancien, engendrent au contraire des transformations du schéma d'interprétation des participants ou, autrement dit, suscitent des redéfinitions des problèmes ou des objets. L'apprentissage en boucles doubles a pour synonyme l'innovation" (130).

The methodological significance of the above point for the present thesis is twofold. On the one hand, it confirms the assumption that shared power dynamics are traceable through the whole collaborative process. Those who control the learning cycle (from setting agenda, selecting stakeholders, and strategizing, to drafting documents and proposing solutions) are in position to influence the stakeholders' potential to come up with innovative solutions and, ultimately, consensus.

On the other hand, the discussed point supports the view expressed in this thesis that a collaboration is, in effect, a power-production site, which generates transformative social impulses.[93] The interaction of "experts" with members "at large" (in face-to-face meetings or through teleconferencing) is the vehicle for the diffusion of redefined issues, problems, and norms (the so-called "social learning").[94]

The examination of the ICANN process suggests that certain lasting outcomes were produced in the formative years. They pertain to 1/ the creation of a regulative regime and the structuring of a problem domain (the DNS management), 2/ the diffusion of norms and values, characteristic of the North American Internet technical community, to broader societal layers (i.e. non-proprietary protocols; meritocratic, open-access

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[93] A similar observation is formulated by Inness and Booher (1999): "Each consensus process… is uniquely defined by the participants and context; the processes and the stakeholders evolve continuously and unpredictably; and they interact with and change their environments while they are at work. *They may gather energy rather than lose it as they move forward*" (6 - emphasis added).

[94] Considering Foucault's power/knowledge formula, which suggests that regimes of power define the range of topics to be discussed and interpretations to be accepted as meaningful, we can construe "social learning" as a process of normalizing particular theoretical perspectives and practical knowledges.

participation), and 3/ the broadening of the global network of stakeholders in Internet development (i.e. the regional at-large organizations in ICANN 2.0).[95]

As undefined and unstable as these outcomes are (considering, especially, the controversial assessment of ICANN's process and policies), I would contend that, by mobilizing the above-presented theoretical framework, the present thesis contributes to the understanding of the potential transformative capacity of global public-policy networks.[96] In addition, the complex multidimensional conceptual framework, itself, provides methodological guidance for the implementation of the Case Study research strategy, which is presented in the next chapter.

2.4. Constructing the theoretical framework

As a result of the above-outlined journey through the territories of three social-science fields, the theoretical framework for the investigation of the ICANN case is constructed.

It can be concluded that the adoption of the postmodern epistemology (i.e. decentralized and fractured authority) by International Relations and Organization Theory scholars has produced compatible conceptual constructs. Sharing a common concern with the contemporary shifting dynamics in governance (at global or

[95] Although, potentially, authority is a feasible lasting outcome of a collaboration, as suggested before, it cannot be counted among the long-term effects produced by the ICANN process in its formative years. As the majority of the interviewees for this thesis stated, ICANN's authority was constantly challenged on the basis of deficient at-large participation and the Stuff's top-down approach to the policymaking.

[96] Indeed, as Reinicke and Deng (2000) observe, the GPP networks could achieve some long-lasting effects, such as closing the participatory gap, developing and disseminating knowledge, and placing issues on the global agenda.

interorganizational levels), they are able to communicate with each other by mobilizing the metaphors of networks, flows, shared power, interdependencies, and collaboration.

Through Foucault's optics of omnipresent power and government as action, the contemporary political rationalities and practices emerge as exemplifying a distinct trend towards fundamental redefining of statehood, of the relation between state, civil society, and the private sector.

According to scholars working in Foucault's perspective on power and government, contemporary globalization, which represents a shift in social action and organization towards the supranational level, is a governance project, and not simply an outcome of technological development. The neoliberal rationalities of government that espoused this project are characterized by a concern with performance and efficiency in governance, which substitutes for a concern with legitimacy. Government alleviates itself of governing social and economic processes and focuses instead on securing the institutions and mechanisms of social and economic government (Dean). In the "network society" (Castells), government shares decision-making power with a number of players who bring their distinct expertise to the process, for "competence is elevated to the top rank of political virtues for maintaining the system, as postmodern politics fears incompetence more than corruption because it is haunted by fears about the fragile character of postmodern structures" (Wolin, 1988).

In this context, the shift in governance practices from an emphasis on the nation-state to broadening civil-society participation is conceived as a mechanism of globalizing "local" techniques of government, because of the appreciation of their effectiveness. The neoliberal rationality of self-governance in "local" settings (e.g. resolving environmental

contingencies at local, national, and supranational levels) is now transplanted to the field of global governance.

The invention of new organizational and institutional forms (i.e. global public policy networks – Reinicke) in response to these dynamics, though, provides a particular challenge for political scientists. Besides the novelty of these phenomena, there is no suitable conceptual apparatus for investigation of "shared power" dynamics, when governments are only one of the policymaking authorities.

In this regard, Organization Studies marks a significant advancement in comprehending the collaborative nature of such formations and scrutinizing the power dynamics in a multistakeholder consensus process. Dealing with real-life interorganizational initiatives, scholars in this field have accumulated knowledge about stakeholder interdependencies in an organizational domain, the phases in a collaborative process, power positions of different stakeholders, strategies for influencing the process and the outcomes. In general, while ignorant of Foucault's view on power as a productive network of force relationships, they have provided ample evidence supporting his thesis. Thus, by focusing on the tangible and intangible outcomes of a collaboration, they are able to argue that this accumulated effect leads to restructuring the relations in an organizational domain.[97]

As already discussed, not much evidence can be found that analytical and empirical results have been communicated across disciplinary borders, when collaborative governance processes are investigated at local (interorganizational) or

[97] On this basis, my hypothesis is developed that the collaborative settings are power-production sites, which accumulate, generate, and radiate transformative impulses to the broader social environment.

global (supraorganizational) levels.[98] In this sense, by rearticulating the notion of power as found in Political Science and Organization Studies, alongside Foucault's concept, the present thesis intends to contribute to the initiation of such a cross-disciplinary dialogue. Power-dynamic patterns in multistakeholder collaborations have been detected and, partially, studied in Organization Studies (collaboration theory). By combining this perspective with the "government rationalities" perspective, which insists on contextualizing the techniques of government, we can now apply this enriched, layered theoretical framework to the experience of a particular global public-policy network, namely, the Internet Corporation for Assigned Names and Numbers (ICANN).

The richness of the conceptual matrix presented in this chapter is considered an asset of the project, for it allows for a sharper profile of power-dynamics, deeper insights into the transformative potential of stakeholder collaboration, and, overall, more conclusive results from the investigation of the ICANN case.

When seen in this light, the ICANN case acquires the significance of an experiment in advancing a public-policy alternative – a private multistakeholder collaborative formation functioning on a consensus basis.

[98] As mentioned before, Gray's Theory of Collaboration provides a rear example of how productive the application of the political category of power to investigating collaborative processes can be.

Chapter 3. Designing the research strategy

Indirect and direct methodological suggestions provided by authors in different academic fields guided the task of designing a research strategy for the investigation of power dynamics in ICANN as a collaborative policy-making entity.

First, indirect methodological suggestions were extracted from the literature used for the construction of the theoretical framework for the present thesis.

For instance, Foucault and the "governmentality" scholars insist on 1/ a model of power as a relational, network-like, and pervasive social environment, which produces negative and positive outcomes alike, and on 2/ understanding contemporary "reflexive government" as epitomizing certain rationalities of government, or governmentality. These emphases have decisively influenced the present thesis' design towards inscribing the ICANN case in the broadest possible context, based on the assumption that the internal power dynamics, characterizing the collaborative process, emanate from the power matrix conditioning the contemporary global social practices and processes.

Thus, interdependencies among the stakeholders were traced back to the initial technological-design phase of the development of the Internet DNS, and the U.S. government patronage of the Internet developers. In addition, U.S. government policy on Internet DNS management privatization was positioned, analytically, at the intersection of the United States' and their foreign partners' strategic trade interests, and the cluster of competing stakeholder interests in controlling the emerging global Internet governance regime.

Guidance was drawn, as well, from Reinicke's and other "globalists"' attention to the emerging global public-policy networks, which function on a "shared power" basis as an innovative organizational response to the widening "governance gaps". Apparently, a specific focus was required for the government-element in the ICANN stakeholder population (the U.S. DoC and the Governmental Advisory Committee – GAC). The following questions, hence, acquired particular significance for the investigation:

1/ Although the U.S. government was the convener of the collaborative process leading to the inauguration of ICANN, it was not, formally, participating in the deliberations there; yet, has it been completely withdrawn from the designing of the new regulative regime?

2/ Other national governments have been allowed only the role of observers as GAC members; yet, have they really been impartial observers of the heated debates and the decision-hammering in ICANN?

3/ Few international organizations have had aspirations towards the ICANN's authority field, namely, the ITU and the WIPO; were they able, though, to influence both the process in ICANN, and the Internet governance debate, and, if yes, how?

Second, direct methodological suggestions came mainly from published analyses of collaborative formations (in Interorganizational Studies and Management Studies) or multistakeholder processes in formal institutions (in International Relations Studies and Global Governance Studies), and they addressed the choices of sources of evidence, stages and techniques for data-gathering and analysis. There are a number of common methodological choices that are discernible in this analytical corpus, which were considered for the present thesis:

1/ Institutionalized multistakeholder collaborative processes are constituted as "cases" for investigation by delineating them from their space-and-time-specific context.

2/ A descriptive approach is applied, in general, to these cases, in order to underscore their idiosyncratic nature. However, by focusing on certain variables in the case (i.e. its structural characteristics, the process, or the outcomes), the analyses have as their aim the enhancement of the explanatory horizon of a particular research.

3/ As the literature review for this thesis shows, power dynamics in the consensus-seeking process have not been specifically targeted by the researchers (with the noticeable exception of Gray, 1989). Due to the discipline-specific research agendas, the focus has been mainly on process stages, institutional arrangements and structures, or tangible and intangible outcomes. Even so, tensions in each stage of collaboration have been registered and strategic solutions for sustaining the "shared power" formula have been designed.

4/ Regardless of the particular research focus, investigations of collaborative processes, uniformly, draw from a multitude of sources of evidence: documentary analyses, interviews, direct observation, etc.

5/ And, finally, although focusing on cases in diverse fields and on different levels (for instance, environmental sustainability policies as developed at local, regional and national, or global levels), these analyses have aimed at developing heuristic devices or producing direct suggestions for both furthering our understanding of the collaborations and enhancing the society's capacity for bridging contemporary governance gaps.

Overall, the methodological suggestions of previous research were considered in the choice of a research strategy for the present thesis, which would be able to 1/ effectively direct the study of the newly-constituted regime of governance in the communications field; 2/ overcome the challenge of making power dynamics observable and their effects visible; and 3/ provide a means for structuring and analyzing the vast body of documented discourses and practices in the selected case. As demonstrated next, the exploratory potential of the Case Study strategy, as presented in the specialized literature, renders this research design particularly suitable for the above requirements.

3.1. Mobilizing the potential of the Case Study strategy

In the last three decades, there has been a rediscovery of the case study as an important qualitative research strategy in Social Sciences, for its descriptive, exploratory, and explanatory potential (see Denzin, 1970; Miles and Huberman, 1984; Merriam, 1988; Feagin, Orum and Sjoberg, 1991; Yin, 1993, 1994, 2004; Robson, 1993; Hamel, Derour and Fortin, 1993; Gillham, 2000; Gomm, Hammersley and Foster, 2000).

The attempts to summarize the attributes and advantages of the Case Study method have led to a number of insightful definitions, agreeing on the following:

1/ a "case" is "a unit of human activity embedded in the real world; which can only be studied or understood in context; which exists in the here and now; that merges in with its context so that precise boundaries are difficult to draw" (Yin, 1993, 59);

2/ the distinctive need for case studies arises out of "the desire to understand complex social phenomena", and a case study "allows an investigation to retain the holistic and meaningful characteristics of real-life events" (Yin, 1994, 3);

3/ hence, a case study is "an in-depth, multifaceted investigation using qualitative research methods, of a single social phenomenon", which is conducted "in great detail and often relies on the use of several data sources" (Feagin, Orum, and Sjoberg, 1991, 2); and, in addition,

4/ based on inductive reasoning, the research follows a path from examination of data to principles and generalizations.

Overall, the exploratory potential of this strategy has been expressed in some "essential characteristics" (see Merriam, 1988). The case study strategy is a/ "particularistic, because it focuses on a particular situation, event, program, or phenomenon"; b/ "descriptive, as a detailed, 'thick' description of the topic under study constitutes the final report of a case study"; "it includes as many variables as possible and portrays their interaction, often over a period of time"; c/ "heuristic, because the ultimate goal of a case study is to reach new interpretations, new perspectives, new meaning, fresh insights; and, finally", d/ "inductive, as the inductive reasoning leads the research from an examination of the data to principles and generalizations"; "as with the other qualitative methods, the Case Study approach attempts to discover new relationships rather than verify existing hypotheses" (11).

Considering the above-outlined features, it has been concluded in the literature that Case Study exhibits the following advantages: a/ it "permits the grounding of observations and concepts about social action and social structures in natural settings,

studied at close hand"; b/ it "provides information from a number of sources and over a period of time, thus permitting a more holistic study of complex social networks and of complexes of social action and social meanings"; c/ it can "furnish the dimensions of time and history to the study of social life, thereby enabling the investigator to examine continuity and change in lifeworld patterns", and d/ it "encourages and facilitates, in practice, theoretical innovation and generalization" (Feagin, Orum, and Sjoberg, 1991, 8).

3.2. Data-gathering methods applied to the ICANN case

In the literature on qualitative research methodologies, it is strongly suggested that one apply the method of triangulation[99] to a case study in order to increase validity, credibility, and representativeness of a particular case.

In the present thesis, the holistic, detailed analysis was enabled by 1/ combining and juxtaposing data obtained through a number of sources (i.e. primary documents, telephone and face-to-face interviews, participant and via webcast observation of quarterly meetings, and secondary documents – published reports, articles, and a book on ICANN, in general), and 2/ broadening the variety of the analytical methods used (i.e. historical analysis, "thick" description, to convey the layers of context "in which the case

[99] The term "triangulation" refers to a research strategy, which combines several research methods when a particular phenomenon is investigated with the goal to provide richness of diverse data and overcome biases.

evolved and from which meaning can be constructed" - Potter, 1996, 154; and "retroduction" as a hybrid approach combining elements of deduction and induction[100]).

To render its activity transparent and, thus, legitimize itself before the respective constituencies and the public at large, ICANN did make all the information concerning the collaborative process available on its website http://www.icann.org. In this respect, although "gaining access" to the corporation's archives did not require any special efforts, acquainting myself with the large amount of documents and the number of substantive and organizational issues discussed in ICANN, as well as the number of active participants representing diverse institutional perspectives and stakeholder interests, and functioning on any level of ICANN's richly-branched structure, constituted a particular challenge.

3.2.1. Assembling a body of primary documents

Through reading, classifying, and filing a vast body of online documents[101], still in the initial stage of the research, I was able to discern certain patterns of stakeholder interaction and to develop some hypotheses about the lines of influence observable in ICANN.

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[100] As Potter (1996) explains, this analytical approach allows a researcher "to begin with applying ideas from bodies of knowledge to a case study, and, later, to induce from findings of the case study the extent to which the bodies of knowledge should be altered" (157).

[101] In a rather accurate estimation, around 3,071 archival units (titled documents) amounting to 13,636 printed pages were used in the present research to reconstruct the process of creating ICANN (the context) and developing major regulatory policies in the initial four years of its existence. These were meeting minutes and discussion transcripts, policy drafts and final policy document versions, online postings in working group list serves, real-life captioning of discussions during the quarterly face-to-face meetings, position letters and papers submitted after calls for comments, official correspondence of ICANN with the U.S. governmental institutions, etc.

Three major types of documents were used for the research to provide empirical data for the case:

1/ The ICANN constitutive documents, which a/ shed light on the U.S. government policy of the Internet DNS privatization (i.e. *A Framework for Global Electronic Commerce* and *Management of Internet Domain Names and Addresses*), and the organizational model envisioned for the new corporation, and b/ laid the legal foundations for ICANN's functioning (i.e. *Memorandum of Understanding between the U.S. Department of Commerce and ICANN*). In many respects, the collaborative process was constituted and conducted following the guidance of these documents, for they define the corporation's mandate, delegated authorities, legal environment, and organizational principles.

2/ Policy documents produced by ICANN: in the four years after its inauguration, ICANN developed policies on different aspects of the Internet DNS management. How these policies had evolved was established by tracing back documents produced by different sublevel units (i.e. working groups, constituencies, the DNSO Names Council). Thus, by using the strategy of following back the elaborate process of policy-crafting in ICANN, I was able to detect the points in time when the collaborative efforts experienced certain influences.

3/ Procedural documents recording the collaborative efforts: these documents were considered the primary source of empirical data for the thesis. In view of ICANN's elaborate structure (three supporting organizations, four advisory bodies, at-large membership, and other subordinate units), the inquiry focused on the collaborative process flowing along the functional meridian, which connects all of the key structures -

the Board, the DNSO, its Names Council, the seven constituencies[102], and the respective working groups.[103]

3.2.2. Conducting interviews

The initial examination of the documents resulted in a chronological map of the case focused on the main policy-discussion units, and a map of stakeholder participation in ICANN, illustrating the "orbits of influence" already noticeable in this early analytical stage (see Chapter 4.3). It allowed, as well for creating another important source of data, namely, conducting interviews with prominent participants in ICANN in two rounds.

3.2.2.1. Round one: structured telephone interviews

Following the initial reading and filing of the primary documents, the emergent patterns of interaction in ICANN were used to develop a detailed questionnaire for structured interviews with a number of active participants in ICANN (see Appendix B for the template of the questionnaire).

First, to achieve representativeness, contacts were sought with participants from all seven DNSO constituencies, and from all levels of the ICANN decision-making

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[102] The constituencies are self-organized entities and determine their own criteria for participation in the DNSO. The DNSO Names Council (NC), which is responsible for the management of the consensus-building process, consists of representatives selected by each of the seven constituencies designated as: ccTLD registries, commercial and business entities, gTLD registries, ISPs and connectivity providers, non-commercial domain name holders, registrars, and trademark, intellectual property, and anti-counterfeiting interests.

[103] In 1999, the DNSO NC constructed six working groups to come up with recommendations on the following policy issues: WG-A - Uniform Dispute Resolution Policy, WG-B - Famous Trademarks, WG-C - New gTLDs, WG-D - Business Plan and Internal Procedures, WG-E - Global Awareness and Outreach, and WG-REVIEW.

hierarchy: from working groups to the DNSO Names Council and the Board, the Staff, and former Interim Board members and CEOs (see Appendix C for the hierarchical pyramid of decision-making in ICANN). Between February and August 2002, interviews were conducted with fifteen of the initially-contacted twenty individuals (see Appendix D for the schedule of interviews, names and countries of residence of the interviewees).

Along with geographical representativeness, long-term participation in the pre-ICANN and ICANN discussions was used as a criterion for the selection of the interviewees. It was assumed that, because of their active and vocal participation, those individuals would have exerted significant influence on the collaborative decision-making.

The expectation behind the selection of the interviewees according to those criteria was that the power dynamics in ICANN would be revealed through the diversity of perceptions – from the authoritative voices of former and then-current ICANN presidents and CEO, and the chairmen of the Board, to the criticizing voices of the dissident Board members elected by the at-large community, or of the Non-commercial Domain Name Holder constituency leaders, each colored by specific regional/national interactive and participative cultural and ideological biases.

Second, to sustain the validity of the study[104], a standard interview questionnaire was developed, targeting both the process during the ICANN formative and collaborative stages, and the outcomes of the collaborative process. The questionnaire was divided into three columns, containing, first, the research questions that were guiding the study;

[104] Yin (1994) distinguishes two types of validity as "quality criteria" for a case study: 1/ internal validity, which "depends on establishing a causal relationship, whereby certain conditions are shown to lead to other conditions"; and 2/ external validity, which "relies on establishing the domain to which a study's findings can be generalized" (33).

second, the questions that the interviewees were actually asked (in fact, with the invitation to the interviews, the individuals received only the set of questions from the second column); and, third, some supporting, additional, more concrete questions to be asked during the interviews.

To strengthen the exploratory potential of the study, questions anticipating rather descriptive answers (the "what" questions) were combined with the "how" and "why" questions. Thus, during the telephone interviews[105], which lasted around one hour each on average, the interviewees were asked questions pertaining to personal experiences, opinions and perceptions. The goal was: 1/ to get the personal stories on the same events and processes which would allow for comparing perceptions and recollections, to study the differing stakeholder attitudes towards the convener's decisions; 2/ to allow the stakeholders' motivation for joining ICANN to emerge, and to compare both the perceptions of the stakes and the initial expectations; and 3/ to identify the fields of expertise that the stakeholders brought to ICANN and, consequently, to study the process of learning and knowledge accumulation as related to power dynamics.

The taped interviews were then transcribed (between fifteen and twenty pages each) and used in the analytical stage of the study.

3.2.2.2. Round two: face-to-face interviews

In a second round of interviews with ICANN participants, conducted a year later at the ICANN quarterly meeting in Montreal from June 22 – 26, 2003, some of the

[105] In a few cases, the interviewees submitted written answers to the questionnaire prior to the telephone interview, which allowed later for a more focused conversation.

already well-established observations and tentative conclusions about the power-dynamics in ICANN were tested.

Using the opportunity to attend the meeting and observe the proceedings in constituencies, committees, the Public Forum, and the Board, I was able to gather personal perspectives from twenty individuals on the issues discussed on the ground, as well as on some more general dynamics in ICANN. Six of these were follow-up interviews, which allowed for further scrutinizing their previously-expressed positions (follow-up interviews were conducted with Milton Mueller, Vinton Cerf, Esther Dyson, Phillip Sheppard, Karl Auerbach, and Jonathan Cohen).

Overall, these unstructured interviews, which were taped and transcribed, helped to confirm the observation of power disparities in the ICANN decision-making process, sustained by such strategies as: 1/ maintaining structural imbalances (i.e. the enhanced representation of both providers of registration services and developers on the Names Council and, consequently, on the Board, and the absence of important stakeholders from the process, such as the Internet users); 2/ converting the bottom-up collaborative process to a top-down decision-making process (with the elimination of the working groups and the increased initiative taking by the Staff); 3/ shifting away from experimenting with a purely private stakeholder regulative model to the more conventional public-private partnership model (via the increasingly direct influence of the GAC members on ICANN policymaking, for instance).

3.2.3. Observation of the deliberative process

In the methodological literature, "observation" is described as an ethnographic method for data-gathering, which focuses on "exploring how communities are created and held together with human interactions" (see Potter, 1996, 51).

In the present study, virtual (via webcasting) and direct observation of the ICANN process was performed for similar reasons: to better understand how the diverse community of participants-volunteers negotiated agendas, communicated perspectives and influences, in order to produce regulative policies; how official and non-official leadership positions were used to promote certain views and values, and curtail alternative ones; and how the realization of the stakeholder interdependencies was holding this conglomeration of voices and interests together, and was even enabling the production of a consensual policy regime.

Applying the direct observation method became possible only in the later stage of the research, when certain interpretations and conclusions had already been developed.[106] Nevertheless, as early as June 2002, the proceedings of the regular quarterly ICANN meeting in Bucharest were systematically observed and analyzed via live webcasting provided by the Oregon University's Videolab.[107]

The duration of the webcast portion of the meeting equaled twenty one hours and 45 minutes. This included the meetings of the DNSO General Assembly (for three hours,

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[106] In the spring of 2002, along with the first round of interviews, letters were sent to 23 Canadian domain-name registrars, accredited by ICANN, inviting them to sponsor my attendance at the next ICANN quarterly meeting in Bucharest, in June 2002, for the purposes of the presented thesis. Tucows, located in Toronto, was the only registrar that offered a lending hand but under a procedural condition which was impossible for me to satisfy. By a stroke of luck, the ICANN Board decided to hold the June 2003 meeting in Montreal, which provided me with the unique opportunity to observe directly the power dynamics characteristic for the face-to-face deliberations in ICANN.

[107] See http://videolab.uoregon.edu/events/ICANN/icann_bucharest.html.

respectively), DNSO Names Council (for three hours), ICANN Board (for three hours), and the ICANN Public Forum (for more than twelve hours, in three consecutive days).

The observation of the deliberations was limited to the visual field of a single static video camera that was used for the webcasting. Naturally, it was restricted to the highly-structured, agenda-driven series of speeches and statements, which, for the webcast viewer, were no more than faceless participant voices.

Nonetheless, an important conclusion concerning the status of the consensus-reaching principle emerged from the observation of the deliberative process. For eight of the eleven agenda topics discussed at the meeting, the Board required stakeholder consensus to be generated before resolutions were voted. Thus, the topics were discussed by different ICANN units prior to the last-day Board meeting, which suggested that the Board considered these issues significantly important for the Internet community.

The distant-observer tentative conclusions provided guidance for conducting direct observation at the following-year ICANN meeting in Montreal.

First, considering ICANN's hierarchical decision-making process, it was essential to observe how consensus was conceived by the constituencies, on particular issues, and then was negotiated with the Board by using certain power strategies. Regarding the most controversial policy issue at the Montreal meeting – establishing contractual relations in ICANN 2.0 with the ccTLD operators - the ccTLD constituency was able to sustain its powerful position in the negotiations with the ICANN Evolution and Reform Committee (ERC) through issuing radical position statements on relations with ICANN.

Second, the process of inventing innovative policy solutions by the participating stakeholders was of particular interest, as well. Thus, at the At-large Organizing

Committee (ALOC) meeting, a major structural weakness of ICANN 1.0 was about to find a particular solution. The previously notoriously unorganized user community was able to move ahead with the project of evolving a regional at-large organization structure for participation and representation in ICANN 2.0.

And, third, it was particularly important to observe the inter-constituency relations, and the inter-personal communication of the attendees, which, in many respects, are the basis of consensus-building and inventing collaborative strategies.

Notes were taken from the observation of both ICANN meetings, and these constituted the basis for the written reports used later for the final analysis of the case.

3.3. Data-analysis methods applied to the ICANN case

The case study evolved from data-gathering to generalizations in four consecutive stages: 1/ mapping the case, where major parameters and elements of the collaborative process were registered; 2/ testing tentative observations of patterns and dependencies; 3/ analyzing the case, where the focus on power dynamics was sharpened; and 4/ drawing generalizations, where, by applying concepts from the theoretical framework, conclusions about the broader field of Internet governance were formulated.

3.3.1. Mapping the case

The initial reading of the ICANN constitutive documents and published critical analyses on the US government's Internet DNS privatization policy and ICANN's policy-

making suggested that, in order to grasp the shifting practices in ICANN, the case should be unfolded in three dimensions: 1/ in accordance with the policy issues discussed in the studied period; 2/ following the time-line of the decision-making; and 3/ tracking the influence-capacities of the participating stakeholders.

First, the flow of deliberations was neatly structured in nine "decision units" (distinct substantive and organizational policy issues). Since the annual ICANN Reports to the DoC reported on the progress in fulfilling the conditions in the *Memorandum of Understanding* (MoU), they were accepted as the most reliable source for isolating decision units for the present research. The set of decision units are comprised of five major substantive-policy and four organizational issues (see Appendix E).The rudimentary notes from the first reading of the archived documents, arranged according to the formulated decision units, provided the basis for a list of analytical categories for data-coding.

The next step in working on the primary documents involved using the qualitative data analysis software package *HyperRESEARCH* for coding and retrieving the generated data.[108]

In effect, the code list was constantly refined in the process of downloading data, attentively reading the texts, and choosing key words as codes for the selected text segments. The resulting files ("reports") were based on the exhaustive use of 1/ all Board meeting minutes and scribe's notes, where they were provided, from teleconferences and in-person sessions, from October 1998 to December 2002; 2/ DNSO Names Council

[108] *HyperRESEARCH* is the flagship product of ResearchWare (see http://www.researchware.com) and has been used in Social Sciences since 1991 – particularly, in sociology and organizational behavior studies. Along with data coding and retrieving, this software is designed to identify and analyze patterns and trends among qualitative data, and, hence, to build hypotheses and theories.

meeting minutes; 3/ Public Forums scribe's notes and real-life captioning; 4/ DNSO General Assembly scribe's notes and real-life captioning; and 5/ distant-participant online discussions during the in-person ICANN quarterly meetings.

By assembling 81 code-entries into 12 large categories, a four-layer-deep code scheme was developed.

As the study was focused on the policymaking process *in* ICANN, the "reports" belonging to two of these large categories (namely, organizational and substantive-policy issues) were directly used in the further analysis of the power dynamics in ICANN, while the rest supplied data for the contextual "thick" description and analysis, in general (see Appendix F for the final code list and samples of first pages of such "reports", as produced with *HyperRESEARCH*).

In addition, voluminous document files, which presented the months-long online consensus-oriented deliberations in the working groups, were assembled. These provided, in effect, the most profound look into the intimate interactive dynamics among a large number of participants in the working groups. Through the analysis of these archives, some elusive power strategies were detected and studied, such as influencing the agenda and pace of a discussion, and even its direction, by imposing an expert's vision via introduced draft-policy documents; or, privileging certain participant views by using the official leadership position in a working group.

The first reading of the coded "reports" and the working group document files was directed towards the development of the two other maps of the case, as exploratory devices.

First, the chronological map of the case was outlined along the life-span of the nine decision units (see Appendix G). Apparently, the consensus-building process on the majority of them was initiated as early as 1999, following the original MoU between ICANN and the DoC. The decision-making phase, which pertained to the designing of a regulative regime for the emerging domain-name registration market, was kept relatively short for those substantive-policy issues,

In contrast, the organizational issues tended to take longer deliberative process and stay open-ended for years (i.e. the At-large Membership issue; the ccTLD contractual relations with ICANN).

Second, the stakeholders involved in the ICANN decision-making process were identified and their positions located on the orbits of influence around ICANN (see Appendix H). The closer to ICANN a stakeholder is on this map, the higher its stakes are in the development of the regulative regime, and, consequently, the stronger its attempts are to influence the policy outcomes. Interestingly, the stakes are not simply financial or linked to gaining market advantages. For the developers (the Internet technical cadre), at stake was their long-standing leadership position in Internet management, which, as our analysis demonstrates, was challenged by other stakeholders, but was effectively protected by the U.S. DoC's decision to grant the regulative power in the DNS management to the IANA-proposed ICANN.

The stakeholder map suggested, as well, that the level of organized interests was gradually diffusing towards the edges of the field. While the developers and the service providers had launched their independent global, regional, and national formations, the non-commercial and at-large Internet users had been mainly relying on representation in

ICANN by opinionated, knowledgeable individuals. This strategy, though, has been detrimental to their ability to influence the decision-making in ICANN, and the effective representation of their interests.

The resulting three-dimensional map of the case constituted the data-matrix, which produced, still in this early stage of the analysis, certain patterns of stakeholder interdependencies and interaction. To test the validity of the observed patterns, a detailed three-level-deep questionnaire for telephone interviews with participants in ICANN was designed.

3.3.2. Testing the tentative observations

The broadening of the data-gathering efforts by including the above-outlined two rounds of interviews and observations was especially beneficial for testing the validity of the tentative inferences, which were produced in the first stage of the research.

The structured, in-depth interviews demonstrated the range of perceptions among the stakeholders about the sustainability of the "shared power" formula in ICANN. In the process of studying this range, the significance of particular structural and procedural elements was revealed (such as the structural imbalances of stakeholder representation; the "taming" of the consensus-building by substituting task forces for the working groups). At this point, the analytical process discerned deeper ideological controversies in ICANN than the rivalries formulated by other authors (in general, between the technical cadre and NSI as the monopolist domain-name registration service provider, or between

the trademark owners and non-commercial domain-name holders; see Muller, 2002; Froomkin, 2001).

In a further attempt to test the logical sustainability of the emerging argument, the insights about particular dynamics of the ICANN process were shared with academic audiences.[109]

3.3.3. Analyzing the case

"The ICANN case", as constituted for the present thesis, spans only four years of constitutive and regulatory activities. Yet, when the focus is on power, it is rather obvious that this particular "slice" of practices under investigation is determined by long-lasting and far-spreading networks of power relations.

In the stage of presenting and analyzing the case (the actual writing of the final "report"), the need for studying the particular case-specific context became apparent. For that purpose, historical analysis and "thick" description were used as analytical methods.

First, the case was inscribed in the continuous U.S. government technological and foreign-trade politics, in order to assess the level of particularity of the Internet DNS privatization policy.

Second, the historical process of the DNS development was canvassed, in order to examine the emergence of actors (stakeholders) and their interests (stakes) towards the management of the DNS.

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[109] See Antonova (2001; 2002; 2003; 2004; and 2005).

Third, the mid-1990s clash of stakeholder aspirations towards the regime of governance in the Internet DNS field was studied in order to better understand the power strategies, alliances, and animosities.

Fourth, a detailed presentation of the deliberative consensus-building process was provided, on most of the decision units, in order to convey how the structural, organizational, and, in some instances, discursive parameters of the "shared power" formula are applied in ICANN, and to understand the causality of the gradual transformation of bottom-up decision-making to top-down policy-development.

Overall, the structure built for the presentation of the case respected both the chronology and problem dimensions of the analysis. Thus, by unfolding the layers of context and "slicing" the case along a number of parameters (i.e. financing, consensus-building, learning, etc.), it was possible to construct meaning and the analysis was ready to move to its last stage – drawing generalizations, based on the ICANN case, about the field of global Internet governance.

3.3.4. From the case to the field: generalization stage

The hitherto outlined analytical methods allowed for paying attention, simultaneously, to the local and particularistic, on the one hand, and the holistic, procedural and historical, on the other. Thus, although explicitly made only in this last analytical stage, the shift from studying the power dynamics of the ICANN process to concluding about the global Internet governance regime was a gradual one.

Finally, from the findings of the study, certain suggestions concerning key concepts presented in the theoretical framework were introduced and this constitutes another contribution of the present thesis to the theoretical field.

Chapter 4. The Internet Domain Name System (DNS) in three dimensions: technical, political-economic, and historical

4.1. The DNS as part of the Internet technical infrastructure[110]

Think of DNS as the lingua franca of the Internet:
nearly all of the Internet's network services use DNS.
That includes the World Wide Web, electronic mail,
remote terminal access, and file transfer.

Albitz and Liu. *DNS and BIND* (1998, 9)

The Internet is about transporting data on an "end-to-end" principle – every corner of the Net is accessible to any computer linked to the network. The transportation of data is mediated by two interfaces: 1/ an address space and 2/ a name space.

The Internet address space constitutes a machine interface, as an Internet Protocol (IP) address[111] encodes information recognizable only by computer-routers that forward data packets to their destination in the most efficient way.

Historically, the Internet address space's architecture was defined as a hierarchical address system in the 1970s, when Vincent Cerf and Robert Kahn were

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[110] The following description of the DNS relies on the original designing documents – *RFC 819, RFC 881, RCD 882,* and *RFC 920*; as well as *RFC 3467*, and some interpretations: Mueller, 2002; Albitz and Liu, 1998; Semeria, 1996.

[111] An IP address is a string of 32 ones and zeros, grouped in four numbers – from 0 to 255, that are separated by dots. It is attached as a header to each particular data packet, identifying its source and destination. The IP address contains a/ a "network prefix", which identifies the network on which the host resides, and b/ a host ID within that network.

working on the Transmission Control Protocol (TCP) as the universal Internet host protocol (see Chapter 4.3).

The Internet name space, on the other hand, is specifically designed to fit the human manner of computer-mediated interaction. The "hosts" are identified by names, embedded in a highly branched hierarchy of domains.

The Domain Name System (DNS) is the real map of resources in Cyberspace. By assigning a name to a host computer, a web site, an email box, etc., it makes a resource identifiable and localizable in the hierarchical geography of Internet space. For that purpose, the name must be unique.[112] As an architectural principle, the hierarchical structure, represented as an inverted tree, renders the Internet infinitely scalable, especially considering that "the depth of the tree is limited to 127 levels" (Albitz and Liu, 1998, 12). This provides for 4.3 billion (exactly 4,294,967,296) uniquely addressed and named resources on the global Net (Semeria, 1996, 5).

Naming computers serves two purposes: 1/ mnemonic, and 2/ for stable connectivity (see Mueller, 2002, 39-40), considering the fact that the two layers of the Internet address space – numbers and names spaces – are not logically dependable on each other, i.e. any change in the number address of a host does not require any change in its name.

The Internet DNS has been defined in various ways, depending on the focus brought by any particular author. For some authors, it constitutes a representation of the

[112] This requirement concerns only the far left segment of the string of characters and numbers, which is easy to satisfy. For instance, santon@alcor.concordia.ca differs from www.alcor.concordia.ca only in its far left end, where the user's name of the particular email box is identified

Internet domain-name space with all the subsets[113] of the Internet in a hierarchical manner. For others, the DNS is "a broad network of name servers" (see Moschovitis et al., 1999, 118), as well as "the software that enables communication between them". Yet, it is also defined as "a distributed database", because "each name server (a special host) maintains a database of all the host names and addresses within that domain" (Albitz, and Liu, 1998, 4-8).

Despite the differing emphases in the above definitions, a virtual consensus exists among the authors that the DNS constitutes an essential protocol in the Internet technical structure, imposed over the addressing system, which enables the movement of data from host to host on the global Net. The DNS is needed to provide a service: to return information about the Internet hosts to each and every enquiry. Mueller has come up with a rather complete definition of the DNS: "The DNS protocol specifies a name space, permitted structures and characters for names, formats for storing data associated with names, and a mechanism for retrieving that data in client-server interactions" (Mueller, 2003, 5).

The DNS consists of a number of structural elements that enable its effective functioning. Paul Mockapetris (1983), for instance, describes four basic elements of the DNS:

1/ Domain Name Space: "a specification for a tree-structured name space" (Mockapetris, 1983), consisting of a set of nodes, all linked in a hierarchical manner to the single root of the tree, which "represents the naming universe, ancestor of all domains" (Su and Postel, 1982). The DNS tree can branch any number of ways at each

[113] See Abbate (1999, 188-191), where she explains that "[d]omains could theoretically represent any subset of the Internet, such as an organization, a type of organization, or even a random selection of hosts" (190).

node, and, in this process, text labels, limited to 63 characters, are assigned to each node. "Potentially, each node or leaf on the tree can create new subdomains *ad infinitum*" (Mockapetris, 1983). The root is the authoritative reference point of the Internet domain-name space and is represented as ".".

The full domain name of each node, therefore, comprises all the labels accumulated on the road from the root to the node. The sequence, itself, represents the levels of the DNS. At the far right end of a domain name are the top-level domains (TLDs).

There are two groups of TLDs constructed on different principles.

a/ generic top-level domains (gTLDs)[114] based on the expectation of potential types of users. There were 14 gTLDs, as of March 2004. Half of them were originally created by Jon Postel[115] in 1984 (*.com, .edu, .gov, .mil, .net, .org,* and *.int*), and the rest were selected and approved by ICANN in the Fall of 2000 *(.biz, .aero, .coop, .museum, .info, .name,* and *.pro*). By the end of 2004, ICANN had selected four new sponsored[116] gTLDs (*.jobs, .post, .mobi,* and *.travel*).

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[114] See Appendix I for the list of the generic top-level domains.

[115] Jon Postel was a respected authority figure in the Internet technical community as he had managed the number space and domain name delegations for many years under a long-term contract between DARPA and ISI. In 1988, an Internet Assigned Numbers Authority (IANA) was established, and Postel was listed as the contact person (see *RFC 1083*). Mueller (2002) notes that "[w]hen the wave of growth hit, the ARPANET elite – Kahn, Cerf, Postel, Crocker, Clark, and a handful of other colleagues – had been working together on networking continuously for about 15 years" (89). As discussed further, this "inner circle" of the Internet Society played an important role in the formation of ICANN. Unfortunately, Postel passed away only days prior to the inauguration of the new corporation.

[116] According to ICANN's documents, "a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD". A sponsor is "an organization to which is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated". In contrast, "an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process" (see *Other Archives,* "ICANN Rio de Janeiro Meeting Topic", 25 March 2003).

b/ country code top-level domains (ccTLDs) reflecting the geographical diversity of the users. These TLDs follow the international standard ISO 3166[117], where countries' and territories' names are designated with two-letter codes.

A domain name, when read from right to left, provides information about the organization that has been delegated authority to assign individual names in a domain. The levels below top-level domains designate the second-, third-, fourth-, etc. level domains. Thus, www.alcor.concordia.ca reveals the path of delegated authority from the *.ca* ccTLD operator[118] to Concordia University, Montreal, and its Alcor server. As will be discussed later (see Chapter 4.2), the semantic quality of the labels, especially on the second level, has been a constant source of conflicts among registrants when a significant part of the DNS has been flattened under the *.com* heavy burden.

2/ Name Servers are the programs-depositories of information about the domain-name-tree structure, in principle, and about a subset of the name space and the associated IP addresses, in particular. At each domain, the "name service" (name-to-address translation) is provided by one or more name servers. Each name server has complete information about some part of the domain it serves, which is called a zone. Conversely, a name server for a domain needs to contain pointers to the delegated subdomains

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[117] This is a list that states the country names (official short names in English) in alphabetical order and the corresponding code elements. See http://www.iso.org/iso/en/prods-services/iso3166ma/02iso-3166-code-lists/list-en1.html.

[118] The *.ca* ccTLD was delegated in 1988, by Jon Postel to John Demco of the University of British Columbia to be managed on a volunteer basis. In 1997, at the Canadian annual Internet conference in Halifax, Nova Scotia, members of the Canadian Internet community agreed that a transition to a more commercial type of operation for the domain name was needed. The Canadian Domain Name Consultative Committee (CDNCC) was created, and, consequently, in December 1998, the Canadian Internet Registration Authority (CIRA) was incorporated as a not-for-profit, private corporation (see http://www.cira.ca/en/about_mission.html). The CDNCC was composed of representatives of the *.ca* Committee (the hitherto administrator of the domain), the Canadian Internet Society (CISOC), Canadian Association of Internet service Providers (CAIP) and the Federal Government (see Canadian Domain Name Consultative Committee, 1998).

(zones), and to know the IP address of at least one root server, in order to be able to answer queries.

At the top of the name server hierarchical structure is a set of 13 computers (root name servers[119]) that contain the list of all TLD name assignments, with pointers to primary and secondary name servers for each TLD (root zone files).

3/ Resolvers are software programs able to extract information from name servers in response to user request. Residing in the end user's computer, resolvers generate a domain name query and send it to a name server for resolution. Some "smart" resolvers begin the resolution process locally by checking the cache files already retrieved from name servers. This reduces their dependence on the root. If there is not an exact match of names, the query must be sent to a root name server. The root name server provides the names and addresses of the name servers that are authoritative for the TLD, where the domain name is. Each next-level name server gives information on how to get "closer" to the answer that is sought, or it provides the answer itself.

Because the root name servers are the focal point for many queries, they "manage a heavy traffic of thousands of queries per second" (Albitz and Liu, 1998, 27).

As a technology, the Internet DNS was designed in the 1980s (see Chapter 4.3); yet, because it was built on assumptions correctly previewing the exponential growth of the medium, the address system was able to maintain the traffic of queries in the Internet commercialization phase without requiring major reconfigurations.

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[119] Ten of the thirteen root name servers are located in the U.S.A. (two are on the MILNET, the U.S. military portion of the Internet, one is on SPAN, NASA's internet – see Albitz and Liu, 1998, 27), two are in Europe, and one is in Japan. The "A" server located in Herndon, Virginia, and managed by NSI/Verisign is the authoritative root name server, because the other servers copy the content of its zone file, which makes the "A" server the single most important point in the Internet DNS in terms of the power over the root zone file content. As Mueller (2002) notes, "[t]he additional servers make the root zone file available more rapidly to users who are spatially distributed, and provide redundancy in case some root servers lose connectivity or crash" (47).

The DNS design of a distributed database, functioning on hierarchical principle, was of crucial importance for resolving some policy issues in the 1990s.

First, the DNS was designed to sustain an ever-expanding network of computers and other resources, which provides no ground for the "scarce resource" argument in the domain name arena.[120] The argument used, historically, for establishing governmental authority over the allocation of the radio-frequency spectrum has become obsolete when the access to the global network is considered. And, second, the distributed administering of the domains in a single domain name space, where the resolution process relies on a single reference point, requires central coordination but of a limited type – only when the expansion of the first-level domains (in practice, just the gTLD group) is concerned, or technological change (innovation) has to be implemented in the entire DNS.[121]

As discussed further, many of ICANN's difficulties in the formative years stemmed directly from the peculiarities of those DNS technical-design features, as they allowed particular stakeholder interests to impact the pace and direction of the policymaking process (i.e. the ccTLD operators independent position due to the legacy distributed-responsibility principle, or the technical cadre domination due to its legacy central-coordination role).

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[120] Conversely, in the address space, concerns about its exhaustibility have prompted the IETF to develop a new configuration – the next generation Internet Protocol IPv6. While IPv4 provides an address space of about 4.3 billion unique addresses, IPv6 can support billions of billions of hosts, even with inefficient address space allocation, due to an expanded address – 16 bytes long with 61 bits allocated to the network address, compared to the 32 bits provided by IPv4.

[121] Regarding ICANN, this administrative peculiarity limits its policy functions only to the "global" issues, and leaves the initiative for local in scope policies to the lower-level domain administrators. Evidently, the coordination of responsibilities should be based on contractual basis between the central regulator (ICANN) and the registry operators of gTLDs and ccTLDs, which proved to be the Gordian knot for ICANN.

4.2. The DNS as a global resource: political economy

Concerns about "right" and "ownership" of domains are inappropriate.
It is appropriate to be concerned about "responsibilities"
and "service to the community".

Jon Postel, *RFC 1591*
"Domain Name System Structure
and Delegation" (March 1994, 4)

The domain name space defines a universe of Internet identifiers, which acquired commodity-like qualities in the 1990s. Domain names can be "leased" for exclusive use for a particular fee. Yet, domain names cannot be owned, and the leasing fee does not depend on the demand pressure as it is with the "free market" rule. The domain name registration market is regulated – at both its "wholesale" (registries) and "retail" (registrars) levels – by providing limitations on the supply end (i.e. deciding on the number of new gTLDs), controlling the access to the retail market (i.e. accrediting a limited number of registrars), and imposing universally applicable policies on the players (i.e. the trademark protection requirement for the accredited registrars).

In sum, as a specific layer of the Internet technological infrastructure, the domain name space can be characterized in economic, as well as, technical terms. And, this perspective can provide answers to the questions concerning the governance of the Internet DNS.

4.2.1. Commoditization of the Internet Domain Name Space

In order to designate the existence of an entity in a network's address or name space, an identifier must be unique. Hence, by their nature, identifiers in technological systems are "exclusive resources"; that is, "the assignment of a name or address to one thing necessarily prevents other things from using the same name or address at the same time" (Mueller, 2002, 19).

Exclusiveness does not create many problems with administering an identifier space when that space is undifferentiated. That is the case with the Internet Numeric Address Space, where the assigned machine-readable numeric addresses do not significantly impact one's experience on the network.[122]

Domain names, though, often attract competing claims for the same assignment, because they are semantically meaningful. The second-level domain names, especially, have constituted a highly contested territory, since many commercial activities have switched to the Internet and vied for visibility under the *.com* domain. The desire for a short, memorable, and easily guessable second-level domain name, which had defined much of the *.com* "gold rush" in the mid-1990s, was based on the assumption that users see the DNS as the directory of Internet resources. Thus, it was expected to find particular web sites by simply adding *.com* to a keyword.

Later, with the advent of browsers such as "Google", it was realized how inefficient this way of surfing the Internet was. Yet, the above assumption had already created significant disturbance among Internet stakeholders. The big business trademark

[122] The only difference it makes is whether the host address is closer to the center of the network, in terms of the speed of performance.

owners, in particular, perceived domain names as clones of their trademarks in Cyberspace and, therefore, as pieces of intellectual property to be protected. As Mueller (2002) summarizes, "[t]he growing perception that domain names possessed significant business values stimulated efforts to secure stronger property rights over them. Trademark litigation became the vehicle for these assertions" (115). Along with some celebrities, showbiz enterprises, and even politicians, international corporations were lobbying the U.S. government to design a regulative regime for consumer and intellectual property protection against fraud and speculative domain name registrations (cybersquatting).

In the other corner were the libertarians who perceived the domain names as expressive personal signatures and believed that Cyberspace should be about "freedom of speech" and preserving the hitherto "first-come/first-served" principle of domain name registration.

Theoretically, the domain name space is able to satisfy a very large and intensive demand for unique identifiers, as was discussed already in the previous section. What went wrong in the mid-1990s was the unexpected radical flattening of the DNS configuration caused by a rapidly escalating demand for a single TLD (the *.com* TLD).[123] In economic terms, there was a perception of scarcity of second-level domains in the *.com* TLD, as the most desired and meaningful short and memorable English words had

[123] Three of the existing gTLDs at the time (*.mil, .gov,* and *.int*) were, in fact, closed to the public. Among the other four, only *.com* referred to the commercial activity burgeoning on the Internet. Hence, the enormous burden put on this single TLD to host millions of second-level domain names.

already been registered (often, by speculators, only to be offered later on the secondary market for significant amounts of money).[124]

The combination of a wrong assumption about a user's habits and the multiplied demand for registered domain names in one particular gTLD caused by the expansion of e-commerce, endowed the Domain Name Space with value, and created an urgent need for regulating the process of identifier allocation.

The commoditization of domain names, however, began several years before the crisis of the so-called "domain names wars" of the mid-1990s, and coincided with the invention of the World Wide Web (WWW).[125] The technical decision to apply the Domain Name Space naming convention to locating web sites (domain names included in URLs) [126] created a demand for visibility on the web. The instantaneous and interactive communication that the WWW provided in the early 1990s enabled the beginning of a certain commercial activity on the global Net.[127]

A more specialized demand for registering domain names for commercial purposes under the *.com* domain prompted the privatization of the registration service in December 1994 (see Chapter 4.3). The National Science Foundation, which was the U.S. government agency contracting the service of maintaining the DNS to Network

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[124] Tim Berners-Lee (1999), the inventor of the World Wide Web, reflected on this phenomenon: "The scramble for recognizable domain names, like *candy.com* and *gable.net* reached fever pitch. Speculators began to register any name they could think of that might someday be worth more than the one-hundred-dollar registration fee" (127).

[125] Mueller (2002) suggests that, in fact, "the 'Webification' of domain names was the critical step in the endowment of the name space with economic value" (109).

[126] URL stays for "uniform resource locator", which is a standard address format enabling the system to find a particular location within the WWW information space.

[127] The growth of the Internet due to the WWW is reflected in the following numbers: by the end of 1991, there were approximately 617,000 host computers on the Net (see Lottor, 1992). By January 1999, the number had grown to over 43,000,000. As the Internet pioneer Vint Cerf comments, "[t]he growth factor is slightly shy of doubling every year. Assuming continued growth at this rate for the nest several years, Internet will have nearly a billion devices on the network by the beginning of 2007" (Cerf, *Climbing the Digital Mountain*).

Solutions, Inc. (NSI), "had no charter to support commercial registrations", and, when registration applications handled by NSI went from 300 per month in 1992, to 1,500 in mid-1994, then to over 30,000 in late 1995, it decided to authorize the registry to charge for domain name registrations in *.com, .net,* and *.org* (see Mueller, 2002, 111). Registration fees were imposed in mid-September 1995. [128]

The registry benefited financially from its monopolistic position and made no effort to regulate access to the lucrative *.com* domain. The original principle of "first-come/first-served" registration was kept intact and, thus, the opportunities to appropriate as many domain names under *.com* domain as possible was abused by a number of speculators, and a secondary domain name market was created.

It can be concluded from the above that the combination of several factors on technical and economic policy levels, such as the address (numbers and names) space specification, the decision to commercialize the access to the Domain Name Space, the NSI's monopolistic service-provision position and the wide-open registration process - all contributed to endowing the domain name identifiers with economic value.

4.2.2. Public Good model vs. Common Pool Resource model

The U.S. government decision to apply the "self-governance" formula to the Internet DNS management was advertised as a privatization policy. The stated intention to, ultimately, transfer the responsibility for administering the DNS to private players was not based, though, on a clear understanding of the property characteristics of the domain

[128] Initial two-year registration was provided for U.S.$100. After the second year, the registration of a domain name could be renewed annually for half price - $50.

name space.[129] The newly established corporation, ICANN, was seen as a "public trustee" mandated to maintain the stability of the Internet and foster competition in the registration market in the "public interest".

Nevertheless, the delegation of authority over the management of an essential Internet technical layer to a private corporation, presumably representing all of the global Internet stakeholders, did not answer some important questions with economic and administrative significance: What type of good is the Internet Domain Name Space? Is it a "public good", such as clean air and world peace, that is in need of protection by governments? Or, should it be conceived as a "commons", such as the electromagnetic radio-wave spectrum and outer space, which is in need of an international regime of allocation? In addition, what are the governance implications of the global scope of the medium; how difficult is it to regulate a global resource by means of a private corporation?

The above questions have so far escaped public debate. Yet, with the United Nations entering the arena of Internet governance in late 2003, they are doomed to ignite disputes along the axes of local vs. global governance, public vs. private authorities, telecommunication vs. datacommunication model of governance. As the Canadian independent consultant Don MacLean (2004) observes in his Background Paper for the International Telecommunication Union (ITU) Workshop on Internet Governance (Geneva, 26-27 February 2004), "the whole question of Internet governance is very unstable and highly contestable on every dimension, ranging from the definition of key

[129] See U.S. GAO (2000), where it is stated that "[d]etermining whether there is government property may be difficult. To the extent that transition of the management control to a private entity would involve the transfer of government property, it is unclear if the Department has the requisite authority to effect such a transfer" (4).

terms to the selection of appropriate forms of governance and institutional arrangements" (3); hence, his warning that "absurd results can follow if principles that make sense in one context are applied to very different kinds of problems".

To select the proper form of governance for the Internet, apparently, we should begin with the following question: what type of good is the Internet?

Differing definitions of the Internet agree on two points: this is a global and public network. The Internet was designed with these two parameters as guidelines – to be the network of networks, hence, to provide both interoperability among a multitude of private networks and end-to-end connectivity in global scope.

As little as the economics of the Internet have been studied, there are two prevailing views on the Net as a type of good.

Debora L. Spar (1999), for instance, develops an argument of the Internet "as a virtual and virtuous public good" (344). She enumerates those features that support the argument of the Internet as a public good: the usage of the Internet is nonexcludable and nonrivalrous, and it "foster[s] all sorts of positive externalities" (349) ("top-notch long-distance medical treatment", "tele-education", "economic development... as small producers in remote locations can gain exposure in, and access to, wider markets" – 349-350).

Yet, she realizes that "[a]s with many public goods, the picture is mixed. While some aspects of the Net, particularly its underlying architecture, function rather naturally as public goods, many of the developing uses of the Net break this public space into private spheres where usage can be excluded and consumption rivalrous" (352).

The differentiation drawn by the author in the above quotation suggests that, because of its multilayer design, the Internet cannot be defined as a whole as a particular type of good. Thus, in early 1970s, the concept of an "information (public) utility" was attached to the emerging network by the creators of the ARPANET.[130] The network was originally designed to allow "individuals at different sites to share hardware, software, and data" (Abbate, 1999, 96). As Abbate explains, there was the assumption - at a time when researchers were still using mainframe computers on a time-sharing principle - that "users would be accessing large, centralized machines..., with the network acting as a distribution system for computing power" (96).

As the 1970s progressed, email quickly became the network's most popular and influential service. This was the beginning of the change of conceptualizing the network - from seeing it as "a computing system" to viewing it rather as "a communications system" (see Abbate, 1999, 111).

Interestingly, almost a quarter of a century later, the WSIS "Declaration of Principles" refers to the Internet as a public "facility", when, as MacLean (2004) comments, "in fact Internet services and applications run on the facilities of telecommunications operators" (3).[131]

The important methodological inference drawn from the above-presented viewpoint is that, because of Internet's layered architecture, its different layers should be examined separately in relation to the categories of goods. Moreover, as the DNS protocol illustrates, the relation of a single layer to this classification could fluctuate, depending on the lens through which it is seen. When defined as a protocol and a global

[130] See Chapter 4.3 for historical notes on the ARPANET Project.
[131] Although a discussion of the Internet debate within WSIS is beyond the scope of my thesis, this example is used here to illustrate the complexity and ongoing nature of the debate.

distributed database, the DNS can be seen as a "public good", as far as it is "something to which everyone has access" (U.S. NRC, 2002, 5). When defined, though, as a specification of a hierarchical tree structure constituting the Internet Domain Name Space, the DNS readily fits in the "common pool resource" model, where one person's use of the resource diminishes the potential for use by another: "[a]n identifier space is a finite resource: it can be used up if it is not conserved properly" (Mueller, 2002, 19).

In the literature, common pool resource is defined as "a valued natural or human-made resource or facility that is available to more than one person and subject to degradation as a result of overuse... exclusion from the resource is costly and one person's use subtracts from what is available to others" (U.S. NRC, 2002, 18).

In Mueller's account (2002) of the Internet DNS history, Network Solutions' "response to the Web explosion turned the generic top-level domain name space into a common pool resource" (112). When the Internet was small and noncommercial, the "first-come/first-served" method of domain name registration made perfect sense, as this method had the advantage of extremely low transaction costs. With the commercialization of the Net, though, preserving this method allowed "[i]ndividuals [to] appropriate units of the resource using the rule of capture" (112), because "[t]here were almost no economic or legal constraints on appropriation" (112-113).

4.2.3. Governance regimes for the global commons

Due to the global scope of the Internet, the domain name space belongs to the global commons[132], which are defined as "areas or resources that do not or cannot by their very nature fall under sovereign jurisdiction" (Vogler, 2000, 1).

As the history of the precommercial Internet reveals (see Chapter 4.3), the Internet and its DNS were constructed purposefully as global resources. In the 1980s, the technical community, which was creating the protocol layer of the ARPANET and was "centered in North America but [was] international in scope", and the U.S. civilian federal government agencies, which were "interested in stimulating the construction of a national information infrastructure" (Mueller, 2002, 102), had coinciding goals: "to do whatever was necessary to promote and accommodate the interconnection of users as cost-effectively as possible" (Mueller, 2002, 103). Promoting the Internet's growth[133], before even the commercial use of the network was conceived of, was motivated by broadening (geographically) researcher collaboration, and was enabled by the global reach of the existing telecommunications infrastructure, and some architectural features, such as:

1/ the universal adoption of the TCP/IP specification that allowed interoperability among local networks (for the "standards wars", see Abbate, 1999, Ch. 5 "The Internet in the International Standards Arena").

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[132] In the International Political Economy and International Relations literatures, there is a tendency to use "commons" and "common pool resources" interchangeably. As both terms convey the same connotation of "shared" mode of use, that tradition is followed in the thesis.

[133] In Economics, "network externalities" is a term referring to the increasing usefulness of a network parallel to its growth, reflected by the increasing value, which the users place on a particular network.

2/ the invention of the DNS protocol that created a unified (single root) domain name space and, thus, end-to-end connectivity.

By definition, commons are "the property of no-one" – *res nullius* (Vogler, 2000, 4). When this "natural feature" is understood as "open access" to resources[134], "intensive exploitation" and overuse can occur, leading to "the depletion and collapse" (10) as well as degradation of the common pool (a phenomenon defined in Political Economy as the "tragedy of the commons").

The absence of a world government makes impossible the obvious solution – a regulative regime, which is otherwise applicable to local cases. As Vogler (2000) explains, "technological change and pressure on limited common pool resources will exert pressure for collective regulation" (16).

With the emergence of a world economy increasingly integrated across national borders, the search began for conceptual tools and models reflecting the "globalization"[135] phenomenon. In International Political Economy, the problems of the governance of common pool resources were framed by the concept of "regime".

As Vogler (2000) explains, "regime thinking has provided the 'dominant paradigm' for American (and inevitably other) discussions of international cooperation since the mid-1970s" (22). By adopting the standard definition of "regimes" developed by Krasner (1983, 2), Vogler states that, "[a] regime is regarded as an institution, or more precisely, a set of norms, principles, rules and decision-making procedures that govern a

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[134] The NSI's "first-come/first-served" registration policy in the mid-1990s exemplified such an understanding, considering, especially, the low registration fee, which was not influenced by the demand rate for the domain names under a particular gTLD domain - *.com.*

[135] "Globalization" is often defined in terms of supranational economic activities. The economic dimension is perceived, by consensus in the International Relations literature to constitute the fundament of this phenomenon.

particular issue area... or more relevantly the use of the global commons" (17). This is a form of governance without formal government.

The concept of international regimes is discussed in the literature in terms of 1/ the specific issue areas that regimes govern (23)[136], 2/ "the political actors and their interests" (25)[137], 3/ principles, norms, decision-making procedures, rules or policies, and 4/ regime change (see Vogler, 2000, 23-42).

The concept of international regimes has already been applied to the Internet DNS management (the ICANN experience) by Milton Mueller. In his thorough and influential study *Ruling the Root. Internet Governance and the Taming of Cyberspace* (2002), Mueller conceptualizes the domain name space as a common pool resource and concludes that ICANN is "a nascent international regime, defined... as the organizations and rules established by states to handle governance or regulatory problems that span national boundaries" (212); it is "a new international regime formed around a global shared resource. Its purpose is to define property rights in Internet identifiers and to regulate their consumption and supply" (217).

Mueller outlines three issue areas where ICANN is authorized by the U.S. government to make and enforce policies: 1/ "defining and enforcing property rights to [domain] names", 2/ economic "regulation of the domain name supply industry", and 3/ "the linkage of online identity to law enforcement" (exploitation of the data generated by

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[136] In literature, "international regimes" are distinguished from "international orders" that "superintend activities over a 'wide range of specific issues'" (Vogler, 2000, 23). Yet, specific regimes "necessarily relate to overarching international orders – free market capitalism or the legal and political order of state sovereignty" (23).

[137] Vogler (2000) states that the International Relations literature of the 1970s and 1980s has "revealed the ways in which modernization and interdependence have weakened the extent to which state authorities can exercise control": "Politics in the global system was no longer, if it ever had been, the exclusive preserve of nation states. Their role was now being supplemented and even challenged by a range of non-state and transnational actors" (25).

Internet identifiers to facilitate surveillance and control of Internet users by law enforcement agencies) (218). As for the political actors involved, Mueller considers ICANN "fundamentally a U.S. government contractor", which emerged as a product of "a somewhat precarious bargain between the Internet technical hierarchy, a few major e-commerce and telecommunication firms, intellectual property interests (including WIPO), the European Union, the Department of Commerce, and one or two other national governments, notably Australia" (220).

Distancing myself from Mueller's radical criticism of ICANN[138], I must recognize the fact that the application of the "common pool resource" and "international regime" theoretical framework to the Internet DNS case has proved extremely fruitful.

As belonging to the global commons, the space created by the DNS protocol requires certain technical coordination for assigning[139] unique values to individual users or machines. The DNS was designed as a hierarchy to distribute the assignment responsibilities from the central entity which controls the root to the organizations in charge of the top-level domain subsets (the registries), and to the entities controlling every next level of the domain name space hierarchy.

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[138] Milton Mueller is a Syracuse University Professor and has been involved in the online discussions about the Internet DNS governance since the gTLD-MoU time (1996). He actively participated in the International Forum on the White Paper (IFWP) process, and, after ICANN's inauguration, was one of the most visible participants in the formation of the Non-commercial Constituency. A strong and influential veteran of the constant battles with the Board and Management, he, ultimately, became one of the editors of *ICANNWatch* – the website devoted to criticizing any ICANN decision, although not always from consistent positions. For instance, Froomkin, one of the three founders of the web site, is most concerned with the legitimacy of ICANN, while Mueller objects, in principle, to the harnessing of the free-market potential in the DNS by ICANN as a regulator.

[139] Assignment of domain names is the process of delegating exclusive control of a name within the DNS name space to a responsible party.

On the side of the name resolution service[140], the information about what TLDs exist and at what IP addresses their name servers can be found requires coordination as well. The root zone file which contains this information is maintained by the root server administrators. They determine the content of the list of recognized TLDs and, as some authors have underscored, this provides a point of leverage, of control over market entry (see Mueller, 2002, 2003; Post, 1999).

The need for technical coordination of the Internet domain name space has been the legitimizing argument of ICANN's Management. The whole reforming process (2002 – 2003) was based on the premise of limiting ICANN's mandate to only purely technical-coordination policymaking.

Yet, as the global commons theory suggests, to avoid the "tragedy of the commons" and to conserve the resource space, an international regime has to make decisions about economic rationing. As, theoretically, the domain name space as a whole is inexhaustible, the major concern of ICANN, in its formative years, was how to serve users' demand focused on one particular domain - *.com*. Instead of alleviating the demand pressure, though, by enlarging the top-level domain space and opening a number of new gTLDs, in November 2000 ICANN selected and authorized only seven new gTLD registries. Conversely, a competitive market for domain name registrations was created, which allowed for decreasing registration fees.

Finally, an international regime provides for the coordination of legal and policy issues concerning property rights claims, consumer protection from fraud, and free-speech protection. Much of the criticism of ICANN has targeted this layer of the

[140] Name resolution is the process of discovering what IP address is associated with a given domain name.

coordination task, because of the policies created for protecting trademark ownership in Cyberspace.

To perform the above-outlined coordination tasks, an innovative institutional approach was applied and a private corporation, ICANN, was created to function via global stakeholder representation, with the noticeable exclusion of national governments and international organizations. In the White Paper issued by the U. S. DoC on June 5th, 1998 as a statement of policy on the Internet DNS privatization, four principles were identified as crucial to ICANN's success: 1/ protecting the stability of the Internet (technical coordination), 2/ introducing competition at both the retail level (registration of domain names) and the wholesale level (new registries) (economic and legal coordination), 3/ establishing and maintaining private sector bottom-up consensus development, and, 4/ ensuring full representation of the Internet community in decision making, reflecting the functional and geographic diversity of Internet users. While the first two principles designated ICANN's mandate, the other two established the parameters of an open and largely inclusive policy-setting formation.

Overall, ICANN was mandated to experiment in designing a new international regime for the governance of a common pool resource by excluding those political actors who, traditionally, had been responsible for the preservation and effective management of the global commons. As further analysis demonstrates, in the studied period (1998 – 2002), the experiment could not reach its democratic potential, and, ultimately, ICANN was restructured in 2002 along the more familiar lines of a public-private partnership organization.

4.3. Developing and governing the Internet DNS: historical overview[141]

The ARPANET experience is a reminder that
the efforts of individuals to build virtual communities are
constrained by the realities of money and power that
support the infrastructure of cyberspace.

Janet Abbate
Inventing the Internet (1999, 95)

The Internet was conceived in the context of the "cold war" as an advanced American military command technology. The ARPANET Project that ultimately led to the Internet as we have it today, though, was contracted to and developed by researchers of Computer/Information Science departments in academia[142] who were aware that the grants were provided by the U.S. military agency but envisioned, in general, an interoperable network environment for sharing ideas and scientific results within the international research community.[143]

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[141] The present chapter incorporates historical documents (i.e. *Requests for Comments – RFCs*), scholarly accounts of the precommercial Internet DNS development, and interviews with participants, conducted for this research.

[142] The Advanced Research Project Agency (ARPA), which initiated the ARPANET Project, was established in 1958 in direct response to the USSR's advance in space technology. As Abbate (1999) points out, "[t]he USSR had launched its Sputnik satellite in 1957, setting off alarm in the United States over a 'science gap' and prompting a surge of government investment in science and technology" (8). "Throughout its existence ARPA has remained a small agency with no laboratories of its own. ARPA managers initiate and manage projects, but the actual research and development is done by academic and industry contractors" (36). In 1962, with the founding of its Information Processing Techniques Office (IPTO), ARPA became a major founder of computer science in the United States: "By the mid 1960s IPTO was funding computing research centers around the country to work on projects such as time sharing, artificial intelligence, and graphics" (44). The need was felt to link these computing sites with an experimental network, and, in 1967, $500,000 was allocated for a project of a research network called ARPANET (44).

[143] Abbate (1999) points out that, nevertheless, "ARPA contractors did not have absolute intellectual freedom". Relying on Vint Cerf's testimony, she states that although IPTO's management acted as a buffer between the graduate students and the Department of Defense, the researchers were aware that "military imperative drove the research" (77). This was especially true in the late 1970s and 1980s, when ARPA

The history of the Internet, and that of the DNS as its core layer, as recorded in documents and interpreted by a number of authors, evolved through the interplay of these two distinct cultures.[144] The original military goals established the high-performance criteria of robustness, stability and security, compatibility and interoperability. The academic environment in which the Network's main protocols were designed provided the horizon of inclusiveness, collaboration, and, hence, infinite growth and innovation.[145]

To understand the way ICANN was designed in the late 1990s and has been functioning since then, we have to consider the evolution of concepts, technical solutions, and institutional arrangements related to the Internet as an important factor in the equation.

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transferred the ARPANET management to a military agency and, consequently, the emphasis on defense applications increased.

[144] As Abbate comments, "[t]he ARPA managers decided to temporarily transfer operational responsibility for the ARPANET to the Defense Communications Agency in 1975 after three years of unsuccessful attempts to find a commercial carrier to develop it into a nationwide public service" (Abbate, 1999, 135). There were discussions with the Federal Communications Commission (FCC) and AT&T. In 1983, the ARPANET-Internet was split into military (MILNET) and civilian networks (ARPANET). The general practice was, as Mueller (2002) explains, "[o]nce a new system was no longer experimental, control was routinely transferred away from researchers to a military agency and put to practical use. The military agency might then contract with a private firm to perform various functions" (82). In the case of the Internet name and number assignment functions, though, they remained centralized for both networks at the Defense Data Network (DDN – NIC), at Stanford Research Institute, which was a Defense Department contractor.

[145] Abbate (1999) stresses the "informal management" style that ARPA fostered as the true precursor of this environment. "The organizational culture surrounding the ARPANET was notably decentralized, collegial, and informal. In coordinating its contractors, ARPA relied largely on collaborative arrangements rather than contractual obligations, and technical decisions were usually made by consensus" (54). And, further: "IPTO managers were able to create an environment for their contractors that emphasized research rather than military objectives" (75).

4.3.1. Inventing the Domain Name System, and the precommercial management of the root (1981 – 1991)

Prior to the invention of the DNS (1983), the Internet name space was "flat" (non-hierarchical), represented by a simple "host table" maintained by the Information Sciences Institute (ISI) of the University of Southern California[146] and containing the list of host names and their mapping to and from addresses.

The use of such a simple mapping technology for such a long period suggests that the number of hosts on the network was limited to a manageable amount.[147] Indeed, as Abbate (1999) points out, at the beginning, "users did not move their research activities onto the network automatically or easily... potential users were excluded or discouraged from using it" (83).[148]

This entire situation changed with the project of internetworking (interconnecting heterogeneous networks[149]), initiated by Robert Kahn[150] in the Spring of 1973. A seamless all-inclusive network was envisioned in this project. The interoperability was premised on using a single universal host protocol for transporting data, and this was seen as allowing the internet to grow in scale gracefully.

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[146] The ISI was formed in 1972 as an affiliate of the University of Southern California, located in Marina del Rey. It became a major center for Internet research and DNS administration, the headquarters of IANA since 1988, and of ICANN since 1998.

[147] In fact, the ARPANET grew up from four initial nodes at the end of 1969 (UCLA, SRI, UC Santa Barbara, and Utah), to a fifteen-node system in 1971, and more than 65 nodes in 1980 (Abbate, 1999, 136).

[148] Getting access to the network required either a research contract with ARPA or paying the cost of setting up a new node (between $55,000 and $107,000 in 1972) (Abbate, 1999, 84). Thus, adding a new site was complicated and costly.

[149] As Abbate (1999) points out, by mid-1970s ARPA was operating three separate experimental networks using packet switching: ARPANET (a point-to-point packet telephone network), PRNET (a packet radio network), and SATNET (a packet satellite network jointly sponsored by ARPA, the British Post Office, and the Norwegian Telecommunications Authority).

[150] Robert Kahn was the program manager of the Information Processing Techniques Office (IPTO).

Robert Kahn and Vinton Cerf published the first version of a Transport Control Protocol (TCP) in 1974. After a series of improved versions issued between 1975 and 1977, the feasibility of an internet architecture was finally demonstrated in late 1977, when "[e]xperimenters sent packets from a van on a California freeway through PRNET to an ARPANET gateway[151], then through the ARPANET to a SATNET gateway on the East Coast, over SATNET to Europe, and finally back through the ARPANET to California" (Abbate, 1999, 131). As Abbate (1999) states, "[t]he successful three-way interconnection of ARPANET, PRNET, and SATNET represented the beginning of the Internet as an operational system" (132).

Under the Department of Defense management which planned to create a new Defense Data Network (DDN) on the basis of the existing packet switching networks, "all ARPANET hosts [were] required to implement TCP/IP... by January 1983" (Abbate, 1999, 140).

Meanwhile, in January 1975 the world's first personal computer was introduced in the United States.[152] The implication of this technological advance was the spread of computer-operating expertise to a much wider segment of the American population – individuals who were able and eager to get online.

The above-described developments (1/ the formulation of the TCP/IP from 1977 to 1981, 2/ the universal implementation of the protocols by the ARPANET hosts, and, 3/ the enlargement of the potential user base) circumvented the spiral of Internet growth.[153]

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[151] A gateway is a special host computer, which routes messages between networks.

[152] A small company called Micro Instrumentation Telemetry Systems advertised its Altair 8800 personal computer for only $379. Abbate (1999) comments: "Suddenly, a technology that had been restricted to authority figures in academia, business, and government was in the hands of teenage hobbyists" (137-138).

[153] According to the data published in January 1992 (Lottor, 1992), in the 1980s the number of Internet hosts grew from 213 (August 1981) to 617,000 (October 1991). Most of this growth occurred in the second half of the 1980s: in the fall of 1985 there were almost 2,000 hosts on the Internet; by the end of 1987 there

In this light, it became clear that "[o]ne of the weakest links ... was the ARPANET's approach to naming computers" (Mueller, 2002, 77). To secure further the interoperability of the network, smooth translation of names to host addresses was required.

It is significant that the sense of an upcoming change in the way the name space was conceived, constructed, and managed was already clearly expressed in late 1981 and early 1982. In an exemplary case of a year-long online and face-to-face collaboration[154], the concepts and specifications of the Domain Name System evolved, and an unofficial administrative regime emerged.[155]

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were almost 30,000; and by October 1989 the number had grown to 159,000 (MERIT, 1997). In terms of the networks attached to the Internet, in 1982 there were only 15 networks in the Internet; in 1986 there were more than 400 (Network Technical Advisory Group, 1986).

[154] Among the most active participants in this early collaboration were Vincent Cerf, David Mills, David Crocker, Paul Mockapetris, Jon Postel, Mark Crispin. These were the people that individually and as an informal group contributed the most to the Internet protocols development. Some of them actively participated later in ICANN (i.e. Vint Cerf was the Board Chair).

[155] In September 1981 David L. Mills from COMSAT Laboratories first outlined, in *RFC 799*, a version of a decentralized, distributed name/address translation service. He envisioned a "hierarchical name-space partitioning... both compatible with existing systems and extensible for future systems involving thousands of hosts". The scalability of this expanding name space was to be supported by a topological covering of a set of "name domains" imposed on the internet addresses space. Mills assumed that name domains would correspond to institutions, as, at the time, the ARPA Internet had a rather homogeneous host population (mainly, researchers and military offices, and a handful of corporate entities). Hence, he expressed the view that there would be such domains as ARPA, COMSAT, MIT, INTERPOST, as well as corresponding to various public data networks. In October 1981, Jonathan (Jon) Postel who had already "gained recognition as the person responsible for address and number assignments within the small DARPA community" (Mueller, 2002, 76) reinforced the pro-change argument (see Postel, 1981). On January 11, 1982, at a meeting of the Network Working Group (NWG) held at USC ISI, some principal features of the envisioned new name/address system were discussed (in relation to computer mail), and consensus was generated that: "1/ introducing a hierarchy of domains in the Internet name space should impact only the right ("location") side of an email address; the left ("user") field should be left to each network to determine; 2/ the choice of domain names must be administratively controlled and the highest-level domain names must be globally unique; 3/ although separate servers for each domain have administrative and maintenance advantages, a central server may be a useful first step" (Postel, 1982). On March 1, 1982, in *RFC 811*, the NIC at SRI stated that "the central administration of a global host name data base, along with this simple name server, ... [is] an interim solution on the way to a decentralized, distributed name/address translation service". In July 1982 David D. Clark from MIT Laboratory for Computer Science proposed that "each network (or group of networks) is responsible for maintaining its own names and providing a 'name server' to translate between the names and the addresses in that network" (*RFC 814*). Thus, the "distributed administration" principal was first developed. In August 1982 Zaw-Sing Su (SRI) and Jon Postel (ISI) compiled the ideas concerning the changes in the address and domain name spaces and presented them as *RFC 819*: "The domain naming convention for Internet user applications". The legitimacy of the proposed system was

First, a special emphasis was placed on the intent to form a tree-structured administratively-dependent hierarchy, where "the sequence of domain names in an identifier follows the consecutive levels of administrative responsibilities, beginning with the root of the tree" (see Su and Postel, 1982).

This principle allowed for the decentralization of the naming authority[156] and the distribution of the name service capability, taking into account the proliferation of networks, the accelerating increase in the number of hosts participating in networking, the ever growing size, and the dissemination of the central database. As it was argued, maintaining a centralized administrative approach in these circumstances was "unmanageable" (6).

Second, the domain concept was presented: "A domain can be considered as a region of jurisdiction for name assignment and of responsibility for name-to-address translation" (1).

Third, to provide a forum for discussing the proposed DNS principles, Postel inaugurated a mailing list entitled *namedroppers*[157], where "the documents describing DNS" were reviewed and implementation issues were discussed (see Mueller, 2002, 78).

Fourth, the Request for Comments (RFC) series[158] was used as a quasi-official way to standardize the protocol layer of the Internet by distributing technical proposals

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linked to the consensus reached at the January 1982 meeting to replace the simple name field, "host", by a composite name field, "domain".

[156] A naming authority was defined as a single person, or an office called "registrar", responsible for the assignment of unique domain names. At the top of the administrative hierarchy, there was a registrar of "the naming universe" (the root), who "specifies the top-level set of domains and designates a registrar for each of these domains". That was the way naming authority was distributed down to the lower levels of the hierarchy (see Su and Postel, 1982).

[157] This mailing list is archived at: http://ittf.vlsm.org/ietf/129.txt.

[158] The RFCs were kept online at the SRI's NIC and were accessed through the ARPANET. As Abbate (1999) points out, "[e]ventually, after members had debated the issues through RFCs and at NWG [Network Working Group] meetings, a consensus would emerge on protocols and procedures, and this

and meeting minutes, by promoting informal communication, and by sharing ideas "in the absence of technical certainty or recognized authority" (Abbate, 1999, 74).

By November 1983, after a year of informal discussions and meetings, the Network Working Group (NWG) was presented with two milestone documents for consideration: 1/ a two-part document, which presented the complete and thorough specification of the newly conceptualized DNS, and had been developed by Paul Mockapetris (*RFC 882*), and 2/ a plan and schedule for the implementation of domain-name style names on the ARPA Internet, which was presented by Postel (*RFC 881*).

The former introduced the concept of authority in relation to the functional infrastructure of the domain name space - the net of name servers. The proposed definition was: "Authority is vested in name servers", which suggested that the administrator of a domain, as the custodian of a database, was endowed with the power to edit its content.

The latter introduced two principles to the management of the new top-level: 1/ a "responsible person" would serve as a coordinator for domain-related questions and provide a robust and reliable domain service; and 2/ "[t]he administrator must register the domain with the central authority".

Interestingly, along with the right "to pass along some of his authority and responsibility to sub-domain administrators" (Postel, 1983, 5), a domain administrator was assigned the "responsibility for the behavior of the hosts in the domain in their interactions with hosts outside the domain". In case of a "misbehaving" host, a coordinator "must be able to take action to eliminate the problem" (4).

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consensus was generally accepted by ARPA as official policy for the network. RFCs enabled the NWG to evolve formal standards informally" (74).

There were no instructions how to do this and, in fact, the notion of "misbehaving" was limited to improper protocol usage, but later, in the context of the trademark controversy, policing and controlling a user's domain-name choices was incorporated into the ICANN/registrar accreditation agreements.

The important point here, though, is that from the very beginning the domain administrators who combined the registry/registrar functions were endowed with the power to control user behavior on the Net. Consequently, in the ICANN setting, trademark owners would pressure the service providers to apply this power and curtail users' choices of domain names in order to protect their property rights in Cyberspace (the notorious "famous trademark protection" issue – see Chapter 5.3).

As for the top-level domain choices, the power to introduce/initiate a new domain was initially vested in the hands of the participating organizations. Yet, it was presumed that a "central authority" would possess the ultimate power to register (or not) a new domain and, thus, allow its existence in Cyberspace. With the transfer to semantically meaningful TLDs, only several months later, though, the trust of deciding how many new TLDs would be created and who would administer the new domains was assumed by the technical cadre. Thus, the principle of distributed decision-making power was already compromised in the pre-commercial-Internet era.

The domain name space was rearranged according to a semantic principle when Postel established two categories of TLDs: 1/ "general purpose domains" (later called "generic" TLDs), *.gov, .edu, .com, .mil, .org,* and the temporary *.arpa* domain[159] and 2/ "countries" (later called "country-code" TLDs) (Postel and Reynolds, 1984).[160]

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[159] With the noticeable absence of *.int*, this is the set of seven gTLD in use until October 2000, when the second set of seven gTLDs was selected by ICANN. *RFC 920* envisioned a third category of TLDs, called

In Postel's *RFC 881*, there was no satisfying explanation of what had caused the decision to move organization names from their initially established top-level status to the second-level status.[161] In his study of the historical events, Mueller (2002) suggests that it was Postel's own idea[162] to create general categories as top-level domains. It was first shared in a draft memo (May 11, 1984), and developed further into *RFC 920* (79). As a result, there were a number of voices on the *namedroppers* list who opposed the proposed approach as heading to "the troublesome turf of semantic definitions" (cited by Mueller, 2002, 79). The Internet was still in its precommercial stage and there was no way, at the time, to foresee the governance issues that would be created later by the gold rush to the *.com* domain.

However, by the end of 1985, it had become clear even to Postel that "the choice of top-level names is a highly charged political issue" (Mueller, 2002, 279). In Postel's view, the "general purpose domains" were globally relevant – anyone could register in them. Nevertheless, the Internet administration was seen as being U.S.-centered by the participating foreigners (operators of country-code registries). By then, though, it was too late to go back to the initially proposed administrative, semantically-neutral, manner of

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"multi-organization", for international organizations that cannot be easily classified into one of the other two categories.

[160] This category was based on the International Standard Organization's Standard for "Codes for the Representation of Names of Countries" ISO-3166, issued in May 1981, in order to avoid any political controversies.

[161] Instead, the provided explanation further clouds the underlying reasons: "The motivation is to provide an organization name that is free of undesirable semantics" (Postel and Reynolds, 1984, 2). As Klensin (2003) rightfully suggests, "the historical reasons for particular decisions about the Internet were often severely underdocumented contemporaneously and, not surprisingly, different participants have different recollections about what happened and what was considered important". The following is Abbate's (1999) interpretation of the decision: "This division by type of host was designed to make it easier to manage the domains separately: the military could control the "mil" domain, an educational consortium could administer the "edu" domain, and so on" (190). Next, she pointed out that the DNS plays the role of a virtual directory ("a person who already knows something about an organization can often guess its domain name" – 237). For her, the ultimate effect was that "the Internet's designers increased its usability" (238).

[162] On the other hand, Klensin (2003) asserts that the DNS was the result of the "community efforts" channeled through "[a] number of discussions and meetings".

structuring the domain name space, due to the potential stability and cost-related problems that such a step could induce.

The administering of the domain name assignments in the newly created TLDs was delegated to the SRI Network Information Center (NIC). The NIC provided the day-to-day ruling of the root, for it functioned as the registrar for top-level and second-level domains. Thus, the operational authority of the root was vested in the SRI's NIC (combining the registry/registrar functions), while the policy-making authority was seen, in general, as belonging to the collaborative community of ARPANET researchers.[163]

With the implementation of the DNS protocol, the foundation for global interoperability was laid out and the Internet was conditioned for rapid growth.[164] The technical cadre, on its part, was on the verge of redefining its role as stewards of the global Net. Considering the technical cadre's key position among the other stakeholders in designing and implementing the ICANN project, it is important to understand that "[a]s the infrastructure and use base expanded... their status as researchers began to blur into a new and very different role as the managers of a new international standards organization" (Mueller, 2002, 89).

It was, indeed, in the 1980s that a number of initiatives of the technical cadre produced "a governance hierarchy" which resulted, ultimately, in the blurring of the locus of authority over the root. In late 1983, the Internet Activities Board (IAB) was created to

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[163] As Mueller (2002) speculates, "Postel's involvement in the definition of the new TLDs made it clear that he and other researchers at ISI had been given by DARPA what later was called the *policy authority* over name and number assignment" (81). Postel was, as well, the person who took over the function of assigning country code TLDs in mid-1980s.

[164] See Mueller, 2002; Abbate, 1999 for a detailed examination of the U.S. and European network conversion on the Internet in late 1980s.

oversee different aspects of internetworking.[165] In January 1986, the Internet Engineering Task Force (IETF) was constructed, based on an existing unit in the IAB, to take the responsibility for developing Internet technical standards. In December 1988, the Internet Assigned Numbers Authority (IANA) was first mentioned in *RFC 1083* (Internet Activities Board, 1988), and Postel was listed as the contact person.[166]

I have to accept Mueller's interpretation (2002) of the above-outlined events as reflecting "the technical community's growing perception of itself as an autonomous, self-governing social complex" (93). It is true, as well, that the legitimacy of the designed informal consensus-based process was rooted in "the original trust and collegiality" (94), which later, in mid-1996, was seriously shattered.

Yet, in my view, any analysis of this phenomenon should take into consideration some additional factors. First, the almost two-decade-long process of developing the Internet protocol layer, under contracts with the U.S. federal agencies, was seen as providing the technical cadre with the right to institutionalize its administrative position and lead the standardization activities (although, at the time, no one challenged such a claim). Second, the Internet emerged as the winning global project from a bitter battle on standards and protocols with European governments and international organizations

[165] According to Abbate (1999, 207), the IAB was created in 1983 "in an effort to broaden participation in decisions about the network's design". As a popular forum for discussing all aspects of Internet policy, by 1989 it had attracted hundreds of participants. The IAB leadership, led by Vint Cerf as the Chairman for eight years, who held the title "Internet Architect", decided to divide its activities between an Internet Engineering Task Force (IETF) – for protocol development, and an Internet Research Task Force – for long-range technical planning. Through working groups, communicating via email, and regular meetings of the task forces, standards for the Internet were set by consensus, and then tested in practice.

[166] According to some RFCs, IANA's authority was derived from the IAB, which gave it "policy-setting authority" over assignment functions (Mueller, 2002, 93).

mainly due to the relentless efforts of the ARPANET technical cadre (see Abbate, 1999, 147 – 179).[167]

It can be argued, then, whether the authority to manage (in operational and policy aspects) the Internet domain name space was delegated to the technical elite (as they themselves claimed), was usurped because of the "power/knowledge" possession (as Mueller seems to allege), or was gained via the intellectual ownership of protocols, standards and innovative forms of self-organizing. This moral-ground argument is especially important in light of the DNS appropriation attempts in the 1990s and the legitimacy crisis of ICANN in the first stage of its development, as is demonstrated further.

It was the ARPA research community again that contributed decisively to the promotion of the DNS as a naming convention for the global network by focusing on developing gateways for exchanging email between networks with different naming schemes.

Finally, due to the specific circumstances surrounding the development of the ARPANET, as explained previously, the ARPA research community provided the social locus of an emerging post-industrial culture of collaboration, sharply differing from the standards organizations' bureaucratic procedures. Informality and efficiency were the parameters of that collaboration, as illustrated by the RFCs' way of designing protocols

[167] Mueller (2002), himself, acknowledges that, in technical terms, "the Internet enjoyed a decisive advantage" over alternative technologies: "The design assumptions underlying TCP/IP projected a world of thousands of heterogeneous, independently administered networks that needed to interoperate. This differed radically from alternative protocols such as X.25, which were based on the assumption that data communication would be dominated by a limited number of public data networks run by telephone companies" (85).

and the IETF's manner of open public meetings, where hundreds and, later, thousands of attendees self-organized into working groups for solving particular technical problems.

It can be inferred from the above that the precommercial stage in the Internet development incubated most of the defining components of the ICANN-led experiment in governance.

1/ Building a domain name hierarchy on semantically meaningful categories eventually created the issue area of a new regime for governance of the access and use of common pool resources.

2/ Through generous long-term funding, determination, and light-handed steering, the U.S. government had created the conditions for the emergence of two major stakeholder groups which were conceived while the Internet was still in its pre-commercial stage:

a/ a consolidated Internet technical elite, which, gradually, assumed the leadership role after the establishment of the administrative hierarchy that paralleled the DNS configuration.[168]

b/ a set of large user groups at universities and schools[169], who, through early adoption of the Internet, became involved in the pre-ICANN battles and later constituted the core of the at-Large membership movement in ICANN.

3/ The informal manner of research collaboration that had been adopted in the 1970s was formalized as the culture of Internet standards policy development in the

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[168] In the 1990s, this elite behaved as an "epistemic community" with its decisive role in the regime formation "by altering the cognitions of actors and providing authoritative consensual knowledge to uncertain policymakers" (Vogler, 1995, 204).

[169] To "expand Internet connectivity to the entire U.S. higher-education community", the National Science Foundation (NSF) began supporting an Internet backbone, starting in 1987 – the NSFNET. It was built by "a partnership of Merit Networks Inc.,... IBM Corporation, and MCI Telecommunications under a cooperative agreement award from the National Science Foundation" (see Mueller, 2002, 85).

1980s. Informality and efficiency underscored the manner of communication, while authority stemmed from the expertise and results proved in practice. An international community of experts was nurtured via open-for-anyone email lists and the IETF quarterly conventions.

In sum, already in the 1980s, the boundaries of an issue area, some of the actors, and the cultural conventions of a new regime of governance emerged, based on the development of a new communication technology. Entering a stage of commercialization, in the late 1980s and early 1990s, the global common pool resource created by this technology (the domain name space, hierarchically devised along semantically meaningful lines) would require later an adequate governance regime to attend to the property right claims.

4.3.2. Commercializing the Internet: attempts to privatize the root (1991 – 1997)

The exponential growth of the Internet in the 1980s transformed it from an advanced networking technology for research and military uses to a public communication medium.[170]

The late 1980s was a time of populating Cyberspace with online communities, of hacker attacks, and of the birth of the "new frontier" metaphor. The Electronic Frontier Foundation (EFF) was created in 1990 by Mitchell Kapor and John Perry Barlow to protect civil liberties on the Internet and educate the public about issues related to

[170] Leonard Kleinrock, one of the founders of the ARPA project, realized that such a transformation was taking place still in 1972 when "e-mail was introduced as an ad hoc add-on and it suddenly took over the network and I realized, *Ahhh... this is not about computers talking to each other, this is about people communicating*. This was the first insight I had – that's what was going to make this thing grow" (in Richards, 2002, 42).

Cyberspace. In 1986, the world's first free of charge public Internet access was established by the Cleveland Free-Net. This was a significant event towards the view of public ownership on computer networks, which later clashed with the U.S. government-promoted privatization policies and commercialization of the Internet services and uses. Network security emerged as a major issue in light of businesses' concerns about valuable proprietary information stored on computer networks. Consequently, the U.S. government became aware of its shifting responsibilities towards the Internet – from being its founder and guardian to policing and governing behaviors on the Net.

4.3.2.1. Factors in Internet commercialization

At the time when Internet governance was transferred from the U.S. military agencies to the NSF (1983), the gradual process of privatizing operations and services on the Internet began. Throughout the eighties, in the political climate of *laissez-faire* government created by the Reagan administration, the mentality of transferring, as much as possible, the financial burden of the Internet to private actors took shape.

In the two decades prior to the 1990s, the Internet was entrenched in the public sector, in terms of sources of funding and locus of authority. Customarily, academia was responsible for the research and development phases, and, then, the protocol specifications were transferred to the military agencies for further implementation.

The line of responsibility between the public and private sectors began to blur in the late 1980s, when, with the growing number of local networks and the increasing use

of computers, "a potentially lucrative market... for networking services" emerged (see Abbate, 1999, 197).

The neoliberal aspiration for deregulation and privatization hit the Internet name and address administration's shores in the early 1990s. As, at the time, only half of the domain name registrations were under *.mil* top-level domain, in late 1990, civilian agencies using the Internet were required to pay for registration services provided by the DDN-NIC. This was followed by competitions for contractors to operate the civilian and military parts of the registry. As a subcontractor, Network Solutions ended up as the winner of the new military NIC contract.

As for the civilian Internet, the NSF was asked to come up with a solution. Fresh from leading the privatization of the Internet backbone[171], the agency had a different plan for the name and address administration, as a function requiring central coordination. It decided to delegate the management through a competition – a policy "similar to approaches used in other newly privatized industries" (Abbate, 1999, 205).[172] Consequently, the NSF awarded "distinct cooperative agreements" (January 1993) to

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[171] The Internet backbone privatization, which was completed by 1994, and, effectively, ended U.S. government ownership of the Internet infrastructure, was the first case of privatizing an Internet layer. In 1990, the provision of Internet backbone services came under the monopoly control of a firm, created by three partners: MERIT, one of the NSF funded regional networks, IBM (to supply the packet switches) and MCI (to provide the leased lines) (see Abbate, 1999, 196). In response, other commercial network service providers began joining efforts and linking their networks on a free-exchange basis. Thus, a commercial version of the Internet emerged. Under these circumstances, the NSF decided to replace its own Internet backbone with this rapidly evolving commercial infrastructure. Under a new "Project Development Plan", issued in November 1991 and implemented in 1994, the provision of backbone services was divided among several competitive Internet Service Providers (ISPs), and the old NSFNET backbone was dismantled. By that time, this was the global backbone, linking 28,470 domestic and 22,296 foreign networks (see Press, 1997).

[172] Abbate (1999) suggests, for instance, that the U.S. telephone deregulation policy, from the early 1980s, provided the model for the NSF's privatization policy on the Internet backbone: "The telephone network became, in essence, an 'internet' of local and long-distance telephone networks, with competing long-distance 'backbones'. This was exactly the structure that the NSF was trying to create, and it would have provided an obvious model for the redesign of the Internet – especially since MCI, Sprint and other phone companies were involved in providing Internet services" (239).

three companies, which then established "a collaborative project", namely InterNIC[173], to provide the services (Mueller, 2002, 102).[174]

Although the possibility of charging fees for name registration services was considered, as becomes clear from the news release following the NSF decision, Network Solutions was awarded $4.2 million over a five-year, nine-month period. At the time, there were only around 7,500 domain names registered under the gTLDs, and the cluster of issues that would emerge as a result of the NSI monopolistic position in the domain name registration market, especially after it was allowed to charge fees in late 1995, could not be anticipated.

The registration of second-level domain names by InterNIC was done on a "first-come/first-served" basis. In the following years, this "open access" practice would contradict the property right claims in the *.com* domain, especially those coming from trademark owners, and NSI would be challenged in court in a number of law suits.

Among the factors contributing the most to the process of the commercialization of the Internet in the early 1990s was the invention of the World Wide Web (WWW) – an application program that allowed easy location of any resource on the Net.[175] In the late

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[173] InterNIC or Internet Network Information Center was the Internet governing body primarily responsible for IP address allocations. ICANN has now assumed this role.

[174] These were: 1/ Network Solutions – for registration services, 2/ AT&T – for directory and database services, and 3/ General Atomics – for information services.

[175] The Centre Européen pour la Recherche Nucléaire (CERN) physicist Tim Berners-Lee created the WWW as a shared information space, a web of hypertext documents allowing people to communicate with each other and with computers. This application was built on the top of the existing Internet protocols – TCP/IP, and consisted of three basic architectural principles: 1/ a hypertext transfer protocol (HTTP) to guide the exchange of information between Web browsers and web servers, and, thus, access data and traversing hypertext links; 2/ hypertext markup language (HTML), a shared format for hypertext documents, and 3/ uniform resource locator (URL). The last feature "specifies both the type of application protocol being used and the address of the computer that has the desired data" (see Abbate, 1999, 215). Despite the fact that CERN began distributing the WWW software over the Internet in the summer of 1991, it was only in late 1993 that the system reached a phenomenally large circle of users, after an American research team released to the public Mosaic - an improved Web browser, commercially known as Netscape.

1980s, there were only a few user-friendly applications such as the email and file transfer programs that allowed for wider use of the Internet. It was difficult to locate and retrieve online information without knowing a file and a host's name.

As Abbate (1999) notes, "[t]he Web completed the Internet's transformation from a research tool to a popular medium..." (217). Along with the pattern of information sharing, the Web enabled each user to be a producer of information and to create his/her identity in Cyberspace.

However, WWW inventor Tim Berners-Lee's decision to incorporate the domain name address in the URL format, in order to "take advantage of the global connectivity available over the Internet" (Mueller, 2002, 107), activated a large demand for registrations of second-level domain names, especially in *.com* and *.org* TLDs. As previously noted, the domain names were originally used to identify host computers on the Net (network resources), and not files or other resources (content resources such as documents, images, services, mailboxes, etc.). Consequently, the Internet DNS technical mandate profoundly changed.

First, domain names began to refer to content resources rather than just network resources. Unexpectedly, they became "visible" to the users, especially considering the unprecedented growth of web page numbers. As a result, the number of registered URLs for web pages soon outgrew the number of Internet hosts.

As Mueller points out, "[o]nly a year after its release, in January 1994, there were 20 million WWW users, 95 percent of them using Mosaic" (Mueller, 2002, 107).

Second, because the Internet had never developed a true directory system, end users began treating the DNS as the content directory of the Internet.[176]

Thus, at the juncture of two protocol-related decisions - Postel's decision to use category-based gTLDs and Berners-Lee's superimposing the URL system over the Internet DNS - conditions for a common pool resource were created. Consequently, a universe of policy issues emerged. The most pressing among them soon would become the trademark ownership protection on the Web, which would require the U.S. government to get involved in the name/address registration field and, ultimately, open it to competition and self-governance.[177]

4.3.2.2. Accumulating a policy issue agenda

Along with the field of fortune, though, NSI entered the minefield of property right conflicts as well. There was a growing perception among businesses going online that domain names were seen by potential consumers as brand names, and, hence, they required trademark protection. Indeed, in 1994, a number of conflicts emerged[178], and it

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[176] This practice was reinforced by the browser manufacturers, who incorporated into their software, as "a user-friendly improvement, *.com* as the default value for a name typed in with no top-level extension" attached (see Mueller, 2002, 109).

[177] When the second-level domain name registration demand loomed large in 1994, the U.S. government was still covering the bill to NSI, according to the cooperative agreement with the NSF. Yet, most of the new applications were for the registration of commercial domain names, which contradicted the NSF charter to support only research, education and non-profit entities' registrations. On this basis, NSI was allowed to charge fees for *.com* domain registration, and, later, for all domain name registrations (Amendment 4 to the cooperative agreement with the U.S. DoC, which established both the cost of an initial domain name registration ($100 for a two-year registration), with an annual renewal ($50), and the division of the profit - 30 percent of the funds raised to go to an Internet Intelligence Infrastructure Fund, and the other 70 percent to be kept by NSI).

[178] These were: 1/ character string conflicts, which were almost half of the publicly documented cases of domain name-trademark conflicts; this type occurs when one domain name is desired by more than one applicant, and 2/ name speculation, when an individual registered domain names entirely for their resale value – generic of catchy terms, famous company names or trademark brand and product names.

became clear to NSI that the amount of new registrations per day was not allowing any scrutiny to be performed.

After being charged with "facilitat[ing] illegal use of the marks" by "allowing, and then refusing to reassign, the domain name", in a lawsuit over *www.knowledgenet.com*[179], NSI issued a "Domain Dispute Resolution Policy Statement" (July 1995). Aimed at protecting the registry from future trademark-related lawsuits, this policy assigned the responsibility to the registrants, who were asked to certify that they had *bona fide* intention to use the name, and that the proposed name did not interfere with or infringe the trademarks or intellectual property rights of any third parties. In case of a dispute, the claimant who could prove that they had a trademark identical to a registered domain name would have the right over that domain name.

Four years later, in 1999, when ICANN as the newly formed regulator of the domain name registration field broadened the trademark owners' rights in Cyberspace (see Chapter 5.3), the NSI policy would be referred to as the notorious first case of policing domain name registrations in the trademark lobby's interest.

But, in 1995, both this policy, largely perceived as self-serving on NSI's part while benefiting the trademark owners, and the financial gain as a result of the monopolistic position in the registration market[180] were the catalysts for the strong

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[179] The domain *knowledgenet.com* was registered in March 1994 by a Virginia-based consultant. Yet, the existing Arizona company KnowledgeNet, Inc., sent a cease-and-desist letter in June 1994 to the consultant and complained to NSI. The registry referred to its policy, which required the consent of the first registrant in order to charge a registration. The case went to court in December 1994, and, ultimately, was settled in mid-1995, as the original registrant entered into a consent decree, giving up its rights over the contested domain name (on this case see Mueller, 2002, 120 and Moschovitis et al., 1999, 195).

[180] As Mueller testifies, "Network Solutions' revenues rose to US$19 million in 1996. In 1997 annual revenues leaped to US$45.3 million, and in September of that year an initial public offering of 3.3 million shares on NASDAQ generated a market value of US $350 million" (see Mueller, 2002, 124).

negative attitude towards NSI. On this basis, later on, NSI would be commonly portrayed as a "not to be trusted" partner in the ICANN coalition of stakeholders.[181]

To undermine NSI's significant power as the only provider of commercial domain name registrations, especially in the *.com* domain, Postel proposed to the Internet Society (ISOC) Board the setting up of "a small number of alternate top-level domains managed by other registration centers" (Postel, 1995).

In fact, at the time, this was the only feasible way to upset the NSI monopoly, elevate the pressure on *.com* domain, and, thus, reestablish the original architecture of the DNS – as a deep hierarchical tree structure with a proportionally distributed administration. Ultimately, this was a way out of the economic/policy thicket, which was already challenging the technical experts but was very foreign to them.

In 1996, Postel designed a plan for expanding the domain name space in a demand-driven, but controlled, way in a draft RFC "New Registries and the Delegation of International Top-level Domains", or, as it is often referred to, the "Draft Postel". Although it was never realized, this proposal articulated the technical cadre's belief that the DNS was able, technically and administratively, to absorb, only in a year, the shock

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[181] Reflecting on that issue, Mueller pointed out that "this hostility to VeriSign [formerly NSI] and everything it does is still there and still drives a lot of their ['old Internet boys'] attitudes. In the early stages of ICANN, it was totally polarized – you could not criticize ICANN and its management without their assuming that you were funded by or supporting Network Solutions. It was a crazy atmosphere, because many of us were equally harsh critics of Network Solutions... What is behind that, I think, is that the Internet Society and the IETF people grew up in this environment, where everything was an 'open source', and government-funded, non-commercial environment. Network Solutions was the first sort of intrusion of market logic into their whole world, and nonproprietary kind of approaches to things. And because it emerged to such a dominant position, it really did threaten their control over the management of the Internet. So, they [Network Solutions] are the incarnation of evil [laughing], as far as the Internet Society people are concerned" (interview with the author, May 1, 2002).

of a tide of 150 new top-level domains that were commercially managed by up to 50 new top-level registries and chartered for two-year terms.[182]

The endowment of the domain name space with economic value, since 1994, has been the catalyst for the assertion of authority over the governance of the root. In general, only two parties were in a position to claim such authority: 1/ the U.S. government, which had been the sole funding source of the ARPANET/Internet development, and, 2/ the U.S. Internet technical cadre that had been involved in the development of the Internet protocols, first, on ARPA and, later, on NSF grants and contracts.

In the early 1990s, who "owned" the Internet and who had the legitimate right to set policies were still open-ended questions. In this governance authority vacuum, the technical elite took the initiative to formally establish its position, in the face of 1/ emerging regulatory and policy issues, precipitated by the rapid commercialization of the Internet (i.e. liability for both standards decisions and domain name registration practices), and 2/ the consolidating interests of players, which were often either challenging the technical community's authority over the field (i.e. the NSI controlling, in fact, the operation of the InterNIC; the alternate gTLD registry operators), or requiring certain decisions from it (i.e. the trademark owners; the prospective new gTLD operators).

In an attempt to formalize the existing informal administrative regime that had been developing under the ARPA cadre's leadership since 1983, the Internet Activities

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[182] Considering Postel's influence in the technical community at the time, it is understandable why, later, in the ICANN discussions on the creation of new gTLDs, the view of a rapid expansion of the domain name space was often argued by referring to his proposal of 1996. At the time, indeed, more than 150 individuals submitted applications to IANA to establish their own registries for new gTLDs. Among them were: *.biz, .web*, and *.www* (all proposed by at least three applicants); and also: *.shop, .mall, .eat, .job, .eng, .med, .law, .trade, .bsn, .xxx, .corp* (see Mueller, 2002, Table 6.3, 132-133). Moreover, in mid-1996, a number of entrepreneurs began selling registrations under these top-level domains.

Board (IAB) registered a private, nonprofit organization called the Internet Society (ISOC) in January 1992. This organization was envisioned as a formal entity capable of providing liability insurance to responsible parties in the IETF, funding, and legitimacy to the technical community on the international scene.

Among the authors whose historical interpretations were consulted for the current review, there is no agreement on a "grand design" for the ISOC. Moschovitis et al. (1999), for instance, underscore the financial concerns of the IETF in the early 1990s that "government funding of these efforts [maintenance of Internet standards] would soon dissolve" (167). As a membership organization, the Internet Society was seen as a source of funding.

Contrarily, for Abbate (1999), although the IETF and its mother-organization, the IAB, were closely linked to the U.S. government agencies, there were political reasons for the creation of the ISOC: "With privatization, and with the spread of the Internet around the world, it became politically necessary to move the system's technical administration out of the U.S. government" (207).

Mueller (2002) recognizes the legitimacy of the above analyses, yet, for him the creation of ISOC can be seen as "an attempt to self-privatize Internet governance in a way that finessed the issue of whether approval or any other action from the U.S. government was needed" (95-96). To succeed in this "plot" of bypassing the US government, the ARPA cadre needed "more extensive liaisons between the Internet world and the established international telecommunication standards organizations" (95).[183]

[183] For that purpose, Anthony M. Rutkowski, an American adviser to the ITU, who wanted to transfer the open, consensus based standard creation process pioneered by the Internet community to the established international fora, was invited to join the IAB more than a year prior to the formation of ISOC (in October 1990; see Muller, 2002, 95). He even became the executive director of the new organization (January

The developments in the Internet management field, between 1994 and 1997, suggest that Mueller correctly identifies the creation of ISOC as an expression of the technical community's growing conception of itself as an autonomous, self-governing social complex. Moreover, as Mueller (2002) claims, ISOC/IAB leaders began acting on "a broad agenda of privatizing the Internet's name and address spaces", as they saw the organization, "a nongovernmental and international body with technical expertise, as the natural authority over the name and address spaces" (135).

Nonetheless, there were already signals coming from the international relations realm (especially, the U.S. – EC dynamic interdependencies in the early 1990s), which required the relocation of governance authority from a national to a more internationally representative setting.

As my argument presented in the next section suggests, the U.S. government's policy on privatizing the Internet DNS management was a calculated attempt to promote further the U.S. neoliberal trade agenda in the emerging online e-commerce by curtailing the participation of the world's governments and international organizations in the newly created governance body (ICANN). This was a more important motivating factor than reacting to the technical cadre's attempts to assume governance authority. ICANN was incorporated under U.S. (California) law; it was designed by the U.S. Internet pioneers and employed U.S. lawyers; it was sanctioned by the U.S. Administration (Ira Magaziner and the DoC); its Interim Board of Directors was comprised mainly of U.S. representatives; its mandate and agenda were assigned by the U.S. DoC in a Memorandum of Understanding (MoU).

1992). But, because of differing views on ISOC's mission and methods, Rutkowski "was forced to leave" ISOC in 1995.

Overall, ICANN was a demonstration of the U.S. professed ideology of private sector self-governance.

After a number of rather subtle attempts to declare, unilaterally, its authority over the root[184], the technical community, finally, undertook a major campaign in late 1996. The ISOC announced its intention to develop and implement a blueprint for a global governance structure for the DNS (October 1996), and assigned this mission to an 11-member "blue ribbon international panel", named the International Ad Hoc Committee (IAHC). Dominated by ISOC representatives[185], it included also members from established international organizations (the International Trademark Association – ITA, the World Intellectual Property Organization – WIPO, and the International Telecommunication Union – ITU). The U.S. Administration was awarded only one seat – for a representative of the Federal Networking Council (FNC).

Given the above representation and the closed-meeting manner in which ideas were generated in IAHC, it comes as no surprise that the proposed plan radically differed from the original scenario of a distributed technical administration for the Internet. In the

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[184] Among the historical incidents that Mueller (2002) reports, are the following: 1/ in a series of RFCs published since December 1988, the name of IANA emerged, for the first time, as the authority designated by IAB to do policy-setting over assignment functions (93); the fact that IAB and Postel's assignment function had both been established and financed by DARPA was not mentioned; 2/ Postel prepared a draft charter for IANA, proposing its complete incorporation into the ISOC structure (July 1994); yet, at the time, IANA was still functioning under government contracts with ISI; Mueller interprets this proposal as a step towards the privatization of the name and address spaces (135); 3/ amidst the controversy fomented by the explosion of the domain name registration market, the ISOC president Lawrence Landweber, the IAB chair Brian Carpenter, Jon Postel, and Nicholas Trio of IBM "prepared an Internet-Draft" proposing "a formal role" for ISOC "in the oversight and licensing of competitive registries for the international Internet name space, in support of the IANA and with the assistance of the IAB" (November 1995; 136); the proposal was passed at the ISOC annual meeting in Montreal (June 1996); "The Internet Society was now formally backing a plan to assign commercially valuable property rights in top-level domains to competing registries, collect fees from the licensees, and in the process establish itself as the manager of the DNS root – all without any formal legal or governmental authorization" (136); 4/ in early 1996, Postel came up with his plan for the creation of a number of new TLDs (30-31), in a direct response to the ISOC concerns about the governance of the name and address spaces.

[185] There were six representatives of the technical community: two of each, IAB, IANA, and ISOC.

final report issued by the IAHC (February 4, 1997), the intergovernmental organizations' view of name and address spaces as global public resources was promoted (see International Ad Hoc Committee - IAHC, 1997).[186]

In addition, the participation of the two international organizations (the ITA and WIPO), whose mandate was to protect the trademark and intellectual property interests, resulted in linking the trademark protection agenda directly to the administration of the DNS.[187]

The IAHC plan was preparing the ground for taking over the NSI-controlled registry, under InterNIC, after the expiration of the Cooperative Agreement between NSI and the U.S. DoC in April 1998. In a document known as the Generic Top-Level Domain Memorandum of Understanding (gTLD-MoU), a hierarchical corporate structure was designed. The top governance authority was the Policy Oversight Committee (POC), composed of a representation similar to that of the IAHC. A consortium of commercial registrars would be incorporated in Geneva, Switzerland, as a nonprofit Council of Registrars (CORE), where each registrar would pay an entry fee of US$ 20,000 and a monthly fee of US$ 2,000. These would provide the major source of financial support for the new governance structure of the domain name registration industry. A Policy

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[186] Thus, as Mueller (2002) comments, the report's language was influenced by the ITU representative and "reflected concepts never before used in the Internet arena but well known in the context of state-owned or state-regulated post, telephone, and telegraph companies" (144). For him, the ideas of a global registry database conceived as a natural monopoly, administered on a nonprofit basis, and used in a shared and not exclusive way, and of multiple, competing registrars that would all share access to the same TLDs suggested that "the plan created a [regulated] cartel", which was "a typical outcome for an international, intergovernmental organization, but highly atypical of the Internet" (144).

[187] For more feasible policing, it was envisioned that the domain name space would be slightly expanded, by adding only seven new descriptive TLDs. At the same time, the domain name space would be controlled by excluding, preemptively, all names that corresponded to or resembled "famous" trademarks. A 60-day waiting period was envisioned, as well, after the registration of a new domain, for a review by administrative challenge panels, run by WIPO. In Mueller's view (2002), this last innovation was meant "to eliminate the trademark owners' objections to new TLDs by giving them extraordinary power over domain name registrations" (145).

Advisory Board (PAB) was the consultative body that any signatory to the gTLD-MoU could join.

The plan was implemented in April 1997, in Geneva at an official signing ceremony organized by the ISOC and the ITU.[188] An interim Policy Oversight Committee was constituted (August 1997) and it began to accept applications from prospective registrars.[189]

In Mueller's account (2002) of the events of 1997, the IAHC/ISOC plan for creating a DNS global governance structure spurred a negative reaction from all over the Internet stakeholder spectrum (146-156). Strong opposition came, especially, from U.S. companies and groups, which preferred the policy issues to be resolved within the legal and institutional framework of the United States. Thus, from NSI, which had the most to lose if the lucrative *.com* database should be expropriated by a global registry, to the alternative registry applicants, whose aspirations were completely omitted in the IAHC Final Report, to the American civil society groups, which felt underrepresented in the envisioned global regime in the face of an explicit trademark owners domination – all of these were uncomfortable with the supplanting of the existing "U.S.-centered institutional framework [which was] more predictable and more amenable" (148) to their interests, by a central global administration dominated by trademark owners and multinational telecommunications interests. Surprisingly, even the European Commission's Directorate General 13 (DG-13), which was in charge of telecommunications policy and was

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[188] Mueller (2002) interprets this as an attempt "to assume all of the trappings of an international treaty agreement" (146).

[189] With application fees from 88 companies, a fund of nearly US$ 1 million was created and the starting date for new registrations was set in January 1998. Contracts for developing software for the shared registry were initiated as well.

monitoring Internet domain name developments, did not agree to sign the gTLD-MoU, as it felt excluded from the IAHC process, and, as Mueller suggests, was concerned that "the process was moving too fast and was driven primarily by U.S.-based organizations and interests" (151).

It was high time for the U.S. government to take a position on the international technical community and standard organizations' plan to assert authority over the management of the Internet root. In fact, the domain name controversy had already attracted the Washington bureaucrats' attention, but, at the time, they were still working on their strategy of developing the Internet as the marketplace for e-commerce (see Chapter 4.3.3).

With the unsuccessful attempt of the IAHC to shift the center of authority over Internet DNS governance from a nation-state level (the U.S. government) to the international standard organizations level, an important period of the institutionalization of the power over a common pool resource came to a conclusion. There were, though, a number of outcomes that would impact the emerging regime in 1998:

1/ Developments in the domain name space: the domain name space was transformed from a human-machine interface into a common pool resource as a result of the combination of technical and administrative choices (i.e. the WWW URL incorporating domain names; the NSI "open access" to the *.com* domain; the semantic categories used as generic TLDs). Consequently, claims for property rights on the second-level domain names emerged (in *.com* and *.org* TLDs), which exacerbated the need for formalizing a governance regime.

2/ Contestations to the governance authority: the perception of a governance vacuum emerged among the established and emerging Internet stakeholder groups, in the mid-1990s, because of the privatization of the Internet backbone and the delegation of management authority over the Internet DNS to contractors, as discussed before. The policy authority on name and address spaces, during that period, was still held by the ARPA cadre, and, more specifically, Postel. Under a contract with the NSF, the operational authority on DNS management was delegated to NSI, which controlled the InterNIC database. With the endowment of the domain name space with economic value, the ARPA cadre began to perceive NSI's position of control as a potential threat to its policy authority over the root. To undermine NSI's power, the technical community decided to expand the top level of the DNS and delegate registration functions to a large number of new registries. Unsuccessful in this attempt, the technical community formed a strong alliance with other claimants of authority (some international standard organizations) to govern the domain name space. It had to yield, though, to their conceptualization of the name and address spaces, closed-manner of decision-making, and interest in protecting trademark ownership in cyberspace. Ultimately, the ARPA cadre lost its aura of an open-debate society.

3/ Consolidation of stakeholder positions: a cluster of new players emerged, in the mid-1990s, which shared economic interests in the hottest virtual real estate. Especially aggressive among them were the alternate registry entrepreneurs, and the trademark owners. While the former were perceived as a nuisance by the technical community, the latter possessed strong lobbying power and succeeded in influencing the process of creating a domain name space governance regime functioning to their benefit.

Significantly, established international standard organizations sought to incorporate the Internet industry regulation into their fields of authority (due to the convergence of telecommunications and datacommunications in the early 1990s) by approaching directly the ARPA cadre, and bypassing the U.S. government. This strategy would, ultimately, cost them the first round of the governance-authority power game. Only five years later, though, in 2003, they would be in a position to initiate again a global debate on the governance of the Internet (WSIS), but that time under the auspices of the United Nations.

4/ Emergence of a policy agenda: the universe of policy issues that was conceived with the endowment of the domain name space with economic value promulgated the sense of interdependence among the stakeholders.[190] As a result, a policy agenda table was compiled comprising such items as: a/ trademark protection in Cyberspace, and b/ the introduction of competition in the domain name registration market. Significantly these issues constituted ICANN's mandate in late 1998.

5/ Technical community as a convener: in the mid-1990s, the international technical community, led by the ARPA cadre, reemerged as the most potent stakeholder in the DNS governance field. This community was able to convene an international coalition of stakeholders. For the sake of setting a global administrative regime for Internet DNS governance, though, the ISOC demonstrated the willingness to grant trademark owners preemptive control over the domain name space content in return for

[190] Thus, since 1995, after a series of lawsuits, it became clear to NSI that, in order to preserve its privileged first-comer market position, it had to give in to the trademark owners' pressure, and it designed a Domain Dispute Resolution Policy mechanism. The trademark protection issue was further reinforced by the intergovernmental organizations participating in the IAHC. Despising the NSI's strategy of unlimited and unshared market success, and aiming at the creation of a global governance structure for the Internet, the ARPA cadre created an alliance with the international standard organizations. The common goal was to preempt any attempt of the U.S. government to officially assume governance authority over the Internet.

expanding the TLD space. In late 1998, the ARPA cadre was the ultimate stakeholder selected by the U.S. government to accomplish the ICANN project, because of its uncontested legacy as a successful and efficient convener.

6/ A blueprint for a global governance regime: the IAHC plan introduced to the Internet community the notion of "global governance" of the domain name space. In the mid-1990s, though, most of the world national governments were ignorant of the developments in the Internet domain name space, and the Internet itself was still a U.S.-based technology. It was as well the beginning of the consolidation of a civil society network of Internet users and operators.

4.3.3. The U.S. government policy of privatizing the Internet DNS management (1997 - 1998)

> *If the United States government had tried to come up with a scheme to spread its brand of capitalism and its emphasis on political liberalism around the world, it couldn't have invented a better model than the Internet.*
>
> Don Heath, President of the ISOC (2000)

In the mid-1990s, because of the transformation of the Internet into a dominant communication and commerce medium, particular social visibility achieved its entrance zone – the DNS. The number of new domain name registrations in the NSI-controlled *.com*, *.net* and *.org* TLDs grew exponentially.[191] The unregulated access to the emerging

[191] Mueller (2002) provides the following numbers for the period July 1994 – February 1996: *.com* – from 12,687 registered domain names to 232,004; *.org* – from 1,388 to 17,775; and *.net* – from 545 to 10,890 (110).

common pool resource, though, prompted a number of policy issues, such as collisions over the right of domain name appropriation, and the speculative use of the second-level domain name space.

Under these circumstances, and sensing the inevitability of U.S. government intervention, the technical elite undertook its IAHC initiative, as presented in the previous section, which was internationally representative but lacked the vital support of both the U.S. government and most of the U.S. Internet stakeholders. Indeed, the "domain name wars" involved mainly U.S. participants, users, and institutions.[192] Nevertheless, as I argue in this section, the policy approach that the U.S. government selected to intervene in the Internet domain name controversies was embedded in its long-term foreign relations/trade strategy and reflected the fluctuating balance of power in global information/communications commerce.

4.3.3.1. The U.S. strategic interests

In the 1980s, the United States increasingly focused on removing political and economic barriers to the flow of global information according to its international trade interests.[193] Two issues – telecommunications reform and trade liberalization – formed the principal agenda of American electronic trade diplomacy.

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[192] This fact explains, perhaps, the lack of interest in the international political-economic context of the events, which is palpable in both the online discussions on the DNS policy issues, taking place at the time, and the analytical texts concerning the historical events from that period or reflecting on particular aspect of the DNS governance (see Mueller, 1999, 2000, 2002; Froomkin, 2000, 2001, 2002; Weinberg, 2000).

[193] The analysis of the United States' international communications strategy, presented in this chapter, draws mainly on Dizard's *Digital Diplomacy: U.S. Foreign Policy in the Information Age* (2001).

After 1985, the U.S. government established trade considerations as the main focus of international communications policy, whose new emphasis was on open markets, particularly in the negotiations leading up to the creation of the World Trade Organization in 1993.

The United States' efforts were concentrated on eliminating trade-related barriers – tariff and non-tariff regulations that limit global commerce in information goods and services. Largely successful, these efforts led to "the dramatic expansion of the U.S. information sector at home and abroad" (Dizard, 2001, 74).

The European Union, which is the largest regional market for American electronic exports, constituted an especially challenging partner for American policymakers. By the 1980s, the West European industrial countries had fallen behind the U.S.A. in developing advanced information and communications resources.[194] The need to undertake some effective steps was realized by the European community, and, following the U.S. example of opening the domestic telecommunications market to competition[195], one by one, the industrial countries' governments developed and implemented their own telecommunications deregulation policies. By January 1992, the transition from monopoly to privatized telecommunications systems throughout the region was largely completed. The EC's telecommunications reform plan permitted foreign investors and operators to compete in the newly deregulated regional market. The U.S. communications sector took advantage of these trade and investment opportunities, and, "[b]y 2000, for

[194] As Dizard (2001) points out, "[b]y the 1980s, IBM had become the largest computer supplier in every EC country except Great Britain. One result was that the EC companies at the time had only a 15 percent share of the global market in information goods and services. The rest was split almost evenly between American and Japanese firms" (77).

[195] In 1982, the U.S. Department of Justice issued a consent decree, which ended the AT&T near-monopoly by opening to competition 60 percent of its assets – the 22 local Bell telephone companies. As Dizard (2001) comments, "[i]t opened an era of vigorous growth in the communications sector. Thousands of new companies entered the field" (120).

instance, U.S. investment controlled 30 percent of Germany's telecommunications networks" (Dizard, 2001, 146).

In parallel with the liberalization of telecommunications, the European countries began increasing restrictions on transborder data flows, to protect their citizens' privacy. As early as September 1980, "the Council of Europe adopted a binding convention containing strict privacy provisions", which "clearly affected American trade interests" (Dizard, 2001, 146).[196] In its attempt to oppose this decisive step, the U.S. government redirected its efforts to influencing the Organization for Economic Cooperation and Development (OECD - the Paris-based organization comprising 29 industrialized countries) in preparing "voluntary guidelines rather than legal regulations" (147). In April 1985, "OECD members adopted a set of voluntary guidelines... which affirmed the importance of open information access and the need for personal privacy protection along with the avoidance of 'unjustified barriers' to data flows" (147).

With the advance of the Internet as a commercial platform in the mid-1990s, the data privacy issue reemerged as a focal point in the negotiations between the U.S.A. and its major trade partners. In 1998, the EC approved a directive on data protection that mandated strict privacy controls over electronic data. It required that foreign governments provide similar rigorous data protection or "face a cutoff of data traffic from Europe" (157).

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[196] As early as May 1973, Sweden "created a commission to screen all requests for exporting personal information about its citizens over data networks... By the late 1970s, a dozen other European countries had taken similar steps to limit both incoming and outgoing data, under the rubric of protecting citizen privacy" (Dizard, 2001, 146).

The United States was facing a serious challenge in a time of expanding Internet e-commerce, where the American firms enjoyed an early dominant presence.[197] After a round of contentious negotiations between the U.S. and European authorities, an agreement was finally reached in June 2000, which was based on "compatible standards" for both sides of the negotiations (147). [198]

In the Internet age, as Dizard (2001) points out, "[i]ncreasingly, the new ingredient in the comparative ranking of nations is soft power, denominated in invisible bits and bytes stored in fingernail-sized semiconductor chips" (166). In the late-1990s, when ICANN was created, the U.S.A. was the leading nation in "soft power" potential among over 50 countries, in terms of "a pervasive influence based on information resources" (167).[199]

To promote an approach that emphasized self-regulation of electronic trade by the industries involved, with a minimum of government interference, the U.S. government had to exercise its "soft power" in all three sets of international fora: 1/ at the global level, at the newly-created Geneva-based World Trade Organization (WTO), where the focus was on reducing barriers to electronic commerce, including Internet transactions; 2/

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[197] According to Dizard (2001), "[i]n the early years of Internet commerce, U.S. firms accounted for as much as 75 percent of the transactions". By the turn of the century, the business-to-business transactions over the Internet reached US$ 500 billion worth of goods and services annually, with the prospect for the web-based international trade to reach US$1.3 trillion worldwide by 2005 (175). Consumer sales on the Net, in addition, is the fastest growing sector in the U.S. economy, which has exceeded US$ 100 billion in 2003. American companies, such as IBM, Microsoft, Dell, American Express, Citibank and America On-Line are well-entrenched in Western Europe and other parts of the world.

[198] In order to bridge the different privacy protection approaches and provide a streamlined means for U.S. organizations to comply with the EC's 1998-directive, the U.S. DoC, in consultation with the EC, developed a "safe harbor" framework. It was approved by the EU in July 2000. When U.S. companies certify to the safe harbor, they declare that they provide "adequate" privacy protection as defined by the Directive (see U.S. DoC. "Welcome to the Safe Harbor"; http://www.export.gov/safeharbor/). In essence, the safe harbor policy is a victory for the U.S.-promoted principle of private sector self-regulation and enforcement.

[199] See Dizard (2001, 167) for a presentation of the International Data Corporation (IDC, a Boston consultancy) comparative ranking of global soft power resources.

discussions with America's industrial partners in the Paris-based OECD, concentrated on reaching agreements on so-called voluntary guidelines on trade issues; and 3/ bilateral negotiations with individual countries.[200]

In this context of competing national and regional trade interests, the Internet evolved as a dominant communication and commerce medium in the mid-1990s. Under the banners of building an Information Society in Europe, and creating, initially, the U.S. National Information Infrastructure (NII), and, consequently, a Global Information Infrastructure (GII) (see Appendix J), the Internet was incorporated into the industrial countries trade relations in two principal ways. These were: 1/ by conceptualizing the new medium predominantly as an evolving commercial environment[201]; consequently, in accordance with the dominant neo-liberal doctrine of "less government" and "open markets", the majority of the Western governments declared e-commerce as the principal mode of economic activity in the Information Age, free of tariffs and regulations; and, 2/ by extrapolating the approaches used in long-negotiated contentious policy issues to the e-commerce practices; thus, the U.S. and EU clashed on the online encryption and privacy protection issues, as these were related to the trade-barriers-protection measures.

The 1992 presidential campaign in the U.S.A. is seen by Dizard (2001) as a "defining event" (168) in the process of the new medium's incorporation in U.S. foreign communications policy. For him, "the Clinton campaign trumpeted the need to build a

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[200] As Dizard (2001) recognizes, it is "[l]argely as a result of pressures from the American electronics industry, [that] the State and Commerce departments continually press these countries about their treatment of American exports, involving a wide range of tariff and non-tariff barriers" (176).

[201] As Dizard (2001) points out, already in the early 1980s, the U.S.-Reagan Administration insisted on conceptualizing its foreign communications policy as, primarily, a trade issue, on which the Commerce Department, and not the State Department, should have the lead (123). The history repeated itself in the Internet age, when, in mid-1997, the responsibility for the transition of the DNS management to a private and competitive self-regulatory regime was transferred from the NSF to the Commerce Department, and more particularly, its National Telecommunications and Information Administration – NTIA (see Mueller, 2002, 154 – 158).

high-tech 'information highway'. It was a theme that resonated particularly well with younger voters as an extension of the traditional American faith in salvation-through-technology" (168-169).

The National Information Infrastructure (NII) project was first outlined in the White House Statement titled *Technology for America's Economic Growth: A new direction to build economic strength* (February 23, 1993). The project was framed as a strategy for enhancing U.S. competitiveness in the Information Age, and, accordingly, the newly formed Information Infrastructure Task Force (IITF) was chaired by the secretary of commerce, "[t]he Commerce Department role was enhanced", and an advisory council, "heavily weighted towards corporate interests, was set up to oversee the project" (Dizard, 2001, 169).

Echoing the ambitious U.S. strategy aimed at gaining competitive advantage in the Internet e-commerce, in 1993 the EC published a White Paper titled *Growth, Competitiveness, and Employment: the challenges and courses for entering into the 21st century*. Significantly more loaded with particular social concerns[202], the document envisioned the development of a pan-European information infrastructure as a strategic means for reviving the European economy's growth and competitiveness, and creating new markets and jobs.

A year later, the European project acquired "action plan" qualities in the report *Europe and the Global Information Society: Recommendations to the European Council*,

[202] While the U.S.-promoted Information Highway metaphor implied a focus on creating technological and regulation potential for facilitating the development of the e-commerce, the European Information Society concept exemplified a rather holistic approach to economic strategy issues. It encompassed a number of legal, social, and cultural aspects of the information infrastructure development, such as the positive implications for education, health, and public administration, potential disparities in home access, cultural impact through online access to libraries and museums. Overall, the Information Society project was sold on the premise "to improve the quality of life of Europe's citizens, the efficiency of our social and economic organization and to reinforce cohesion" (EC Commission, 1993, 5).

prepared by a group led by the EC Vice-President and Industry Commissioner Martin Bangeman, and published in June 1994 (Bangeman, 1994). Emphasizing again the urgency of the outlined economic growth and enhanced competitiveness goal, this time the recommendations focused more particularly on speeding up the process of the liberalization of markets and industries, while consolidating the telecommunications universal service.[203]

In March 1994, in a speech at the ITU World Telecommunications Development Conference in Buenos Aires, U.S. Vice-President Al Gore presented, for the first time, the U.S. vision of a Global Information Infrastructure as a way of "closing the resource gap between the industrialized and the emerging economies" (Dizard, 2001, 169). The suggested policy approach was to "remov[e] trade restrictions on information technology goods and services" (169).

The intended message was that to compete successfully on the global stage, countries needed open markets, which translated into 1/ dropping barriers to foreign investment in telecommunication services, in particular; 2/ effectively protecting intellectual property rights online; and 3/ participating in "the development of private sector, voluntary, consensus standards through existing international organizations such as the International Telecommunication Union, the International Standard Organization and the Internet Society" (Gore, 1994).

A series of international events between 1994 and 1998 demonstrated the eagerness of the leading world trade partners – the U.S. and the EU – to influence, as

[203] The Bangeman Report (June 1994) explained why creating urgently a European strategy for competition in the new technologies market was a necessary reply to the U.S. politics: "Why the urgency? Because competitors suppliers of networks and services from outside Europe are increasingly active in our markets. They are convinced, as we must be, that if Europe arrives late, our suppliers of technologies and services will lack the commercial muscle to win a share of the enormous global opportunities which lie ahead".

much as possible, the emerging global e-commerce governance regime by inserting their particular values into negotiations (see Appendix J).

During its second mandate in office, the Clinton/Gore administration was able to pursue its goals further in: 1/ extending the neoliberal values, which guided U.S. domestic policies, to the emerging global e-commerce regime; 2/ engaging a selected number of international entities, where U.S. "soft-power" domination was less challenged, in producing consensus decisions on e-commerce, in particular, and the global governance of communications trade, in general; 3/ promoting a particular model of global governance as an alternative to the established international order, encouraging the retreat of the nation-state, and "filling" the authority vacuum with both multistakeholder participation in negotiations and consensus decision-making; and 4/ conceptualizing the emerging global communications issues as commercial problems, in need for market and trade regulation.

4.3.3.2. The U.S. government's *Framework for Global Electronic Commerce*

In its attempt to develop a global framework for electronic commerce, the U.S. government formed an Interagency Task Force (December 1995), headed by the senior presidential policy adviser Ira Magaziner, to develop policy on global electronic commerce on the Internet. Going to "extraordinary lengths to actively consult with as many actors in the private sector as possible"[204] (Mueller, 2002, 288), the Task Force accumulated strong support for the "private sector leadership" principle. Under the

[204] The Framework was drafted over a period of 15 months, incorporated extensive public comment, and involved 18 federal agencies.

decisive influence of organized business lobbying groups[205], the Task Force released *A Framework for Global Electronic Commerce* (July 1, 1997).

Five principles were formulated there to "guide the development of the new digital economy": 1/ "the private sector should lead"; 2/ "governments should avoid undue restrictions on e-commerce"; 3/ "where government involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent, and simple legal environment for commerce"; 4/ "governments should recognize the unique qualities of the Internet"; and 5/ "electronic commerce over the Internet should be facilitated on a global basis".

These principles were to be applied in nine areas: tariffs and taxations, electronic payment systems; a Uniform Commercial Code for Electronic Commerce; intellectual property protection; privacy; security; telecommunications infrastructure and information technology; content; and technical standards.

As one of the first major Internet initiatives of the Clinton Administration, the Framework, often called "the Magaziner Report", was designed as a domestic policy statement but in fact was intended for the international scene.[206] Thus, for the first time, a comprehensive vision of how governments should approach the Internet as a global marketplace was outlined. Until then, the U.S. and the EU had dealt with individual

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[205] In his historical account of that period, Mueller (2002) pays particular attention to the Global Internet Project (GIP) as "[t]he key vehicle for organizing business interests" (168). It was formed in 1996 by high-level executives of the major world Internet, telecommunications, and e-commerce players: Netscape, MCI, IBM, AT&T, Deutche Telekom, Oracle, Visa International, NEC, Fujitsu, Sun Microsystems, BBN Planet, and EDS (290). Mueller assigns to the GIP the role of "the dominant coalition" under the political leadership of the Internet divisions of IBM and MCI, in the development and implementation of the Internet DNS privatization plan in 1998.

[206] In the following six months, Magaziner and his colleagues were engaged in active diplomatic efforts regarding the U.S. e-commerce strategy in about 22 countries. As a result, "all countries now recognize that the question of the Internet-for-e-commerce is one of the most important issues they have". Also, "at least in principle, they are agreeing with [the] idea that it should be market driven and governments should not try to regulate and control it" (Magaziner, 1998).

policies, such as encryption, privacy protection, and electronic payment. The official decision-makers (national governments) were, literally, instructed to respect the unique nature of the Internet. The document explicitly stated that "governments must adopt a non-regulatory, market-oriented approach to electronic commerce" and "recognize that widespread competition and increased consumer choice should be the defining features of the new digital marketplace".

Due to escalating legal battles and lobby pressures, the privatization of the Internet DNS management became the first area in which the Framework principles were to be applied (the Spring of 1997). One of the Presidential Directives on Electronic Commerce, issued on the very day when the Framework was published[207], authorized the Secretary of Commerce "to support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis" (cited by Mueller, 2002, 157). Taking precedence, apparently, over the IAHC's attempt to appropriate the root, the directive implicitly asserted the U.S. government's authority over the Internet by inscribing the future private self-regulatory regime into the historically-developed contractual dependency with the government. Significantly, the new regime's mandate was already focused on opening domain-name registration services for competition, and dealing with trademark protection in Cyberspace.

[207] To implement the Framework's recommendations, President Clinton issued 13 directives, addressed to particular federal agencies, which were consistent with the philosophy that the private sector should lead in developing self-regulation of e-commerce markets.

During the next six months, an Interagency Working Group on Domain Names[208] conducted a public comment solicitation proceeding on DNS policy issues, along with the National Telecommunications and Information Administration (NTIA) – a branch of the DoC.

By 1997, the governments involved in the U.S.-promoted GII project, had already consolidated their positions on modeling the Internet as a global electronic marketplace, with very limited governmental regulation and unlimited private sector leadership. Even on the contentious data privacy protection issue, the U.S.' relaxed approach had begun to gain some acceptance. U.S. trading partners, though, were not comfortable with the fact that Internet authority still resided exclusively with the U.S. government. The ISOC-led initiative to appropriate the Internet root had the potential to resolve that issue. Shifting the geographical locus of the Internet domain name space management from the American continent to Europe (CORE was to be incorporated in Geneva, Switzerland), the IAHC plan was also in accordance with the ITU's legacy as an intergovernmental telecommunications treaty organization.[209]

Nonetheless, as explained before, the IAHC plan was met with dissatisfaction by the EC Directorate General 13. Conscious of the fact that its authority over the Internet constituted a strong source of power, the U.S. government used it to achieve further acceptance of its private sector self-regulation governance formula and reduce the role of

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[208] The group was created in March 1997 by Ira Magaziner and included representatives of seven federal departments and agencies.

[209] Charging the ITU with "a long-range strategy of assimilation" of new communication technologies, Rutkowski points out that "for most of the ITU's existence, the United States either refused to sign or opted out of most of the ITU's legal instruments". Part of the reason was that "the ITU's jurisdiction has been constrained to a narrow bounded set of 'public' telecommunication networks and services, with general agreement that 'private' networks and services remain outside the scope of the ITU's regimes". As a result, the U.S. has shifted its interest to the WTO and its General Agreement on Trade and Services (GATS), "whose open competitive market-oriented regime and trade ministry constituency act as a global counterpoise to the ITU's managed cartel approaches and PTT constituency" (Rutkowski, 1998).

the European Commission, national governments, and international organizations to that of observing the process and commenting on draft documents (see Mueller, 2002, 168).

4.3.3.3. The road to ICANN: the U.S. government's Green and White Papers

Amidst the international and domestic controversies aroused by the IAHC's plan, a rather different model of DNS management privatization was outlined by the U.S. Administration's Interagency Working Group and the NTIA in a *Notice of Proposed Rulemaking,* published online, and known as the Green Paper (January 20, 1998).

According to that document, the U.S. government was *the* agency possessing ownership of the Internet and the authority to set a policy of its privatization. Nevertheless, succumbing to "the pressures for change", which were coming "from many different quarters"[210], the U.S. government was ready to implement a plan for the transfer of authority to a new private corporation.[211]

As, at the time, the gTLD-MoU project had already reached the implementation phase, it was vital for the authors of the Green Paper to establish clearly the locus of policy-setting authority. By ignoring completely the international coalition assembled by the ISOC and ITU, the document implicitly negated the technical cadre's claim for legitimacy as they were not accountable to the Internet community: "As Internet names

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[210] The Green Paper was the first U.S. official document where an attempt was made to identify the major stakeholder groups on the basis of their vested interests in the Internet DNS management reform. Thus, commercial interests were calling "for a more formal and robust management structure"; trademark holders needed mechanisms for conflict resolution; the NSI monopoly prompted "widespread dissatisfaction" with the absence of competition (apparently, among potential registry operators and registrars); Internet users, who resided outside of the U.S., wanted "a larger voice in Internet coordination".

[211] Against the concern that the U.S. government "will never relinquish its current management role", in the Green Paper, it was stated, in no uncertain terms, that "[t]he U.S. government would... phas[e] out as soon as possible and in no event later than September 30, 2000..." (U.S. DoC. The Green Paper, 1998).

increasingly have commercial value, the decision to add new top-level domains cannot continue to be made on an ad hoc basis by entities or individuals that are not formally accountable to the Internet community".[212]

The proposed plan envisioned a "representative not-for-profit corporation" with its mandate limited to setting and overseeing policies on several functions of the domain and number spaces[213]: 1/ management of number addresses; 2/ coordination of the root-server network; 3/ maintenance and dissemination of the protocol parameters for Internet addressing.

The rest of the name and number functions, such as the regulation of the domain name registration system and process, would be coordinated by a competitive system. Thus, consistent with its deregulation policy in communications, the U.S. government was setting the stage for a "free market regulation" regime in the domain name registration services. To create that competitive system, the Green Paper proposed detailed policies on 1/ opening the domain name market to competition, and 2/ resolving the trademark ownership issue.[214]

The Green Paper outlined, for the first time, as well, a governance regime in communications based on the notion of global-stakeholder collaboration. In fact, new

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[212] Additional light on the real U.S. government's motivation to ignore the gTLD-MoU plan and proceed with its own project instead was shed in the DoC's response to Tom Bliley, the Chairman of the House Committee on Commerce: "The Administration was concerned that the gTLD-MoU relied too heavily on international governmental bodies and did not enjoy adequate support from the commercial community and other private sector communities" (U.S. Department of Commerce, July 8, 1999, 4).

[213] The intention to limit the new corporation to a "technical mandate" was embedded in the overall U.S. government vision on the issue of Internet governance: "We doubt that the Internet should be governed by one plan or one body or even by a series of plans and bodies. Rather, we seek to solve a few, primarily technical (albeit critical) questions about administration of Internet names and numbers" (U.S. DoC, The Green Paper, 1998). The ICANN reform of 2002, in fact, aimed at resolving the persistent controversies among the stakeholders by similar means: achieving consensus on a limited technical mandate (see Chapter 4.3).

[214] The Green Paper questioned the need for a uniform dispute resolution policy, and proposed that each registry select its own process. Apparently, this position was in sharp contrast to the one developed by the IAHC under the pressure coming from the WIPO's part.

terminology was introduced into the field, borrowed from Management Studies and experiences, describing a self-regulatory regime with global dimension. Half of the members of the new corporation's board, for instance, were to represent Internet users, and be selected by an Internet-user membership association. Other constituencies to be represented on the Board were: the regional address registries (RIRs), the Internet Architecture Board, and registries and registrars.[215]

Overall, the Green Paper polarized decisively the stakeholders' positions on Internet DNS management reform.[216] On the one side, there were the pro-U.S. interests (U.S. big businesses, prospective registry operators and registrars, civil society groups and organizations), which did not want to work through established international institutions such as the ITU, and believed that developing a robust e-commerce industry over the Internet could be done only within an established framework of national laws, regulations, and policies.

On the other side, there were the supporters of the gTLD-MoU plan, who, despite their differing motives and aims, wanted the Internet to escape the traps of both U.S. domination on the international communications and commerce scene, and the inadequate, closed, and slow-functioning governance regimes of the international treaty organizations.[217]

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[215] ICANN's representative structure later would include the intellectual property and trademark owners, business and non-commercial domain-name holder interests, as well.

[216] Although the Green Paper authors stated that the discussion draft was developed by taking into consideration over 430 comments, amounting to some 1500 pages (see U.S. DoC, The Green Paper, 1998), they realized that "no solution [would] win universal support". Indeed, the two-month period given for public comments on the Draft policy revealed that "seek[ing] as much consensus as possible before acting" was a difficult process of negotiating interests.

[217] Keith Dawson (1998), the author of the electronic magazine *Tasty Bits from the Technology Front (TBTF)* reported: "The plan [the Green Paper] is being attacked as too US-centric by European observers, who are especially invested in the Geneva-based CORE process". In her view, "CORE is among the biggest losers. The 88 entities around the world who each paid $10K to become CORE registrars seem to

The public response to the Green Paper was symptomatic of the scope of the controversies in the field. While the U.S. government decision to privatize the DNS management was acclaimed by virtually all parties, the proposed particular policy solutions were met with strong criticism. Thus, the proposal to create new gTLDs was opposed by trademark holders on the grounds that "it would make patrolling web pages more difficult for businesses".[218] The Green Paper was criticized for not handling well the problem of dispute resolution and preserving, in essence, the *status quo* (disputes to be decided by courts).

Power-sharing was gradually emerging from the behind-the-scene negotiations among the major opposing parties as the winning strategy.[219] The consolidation of opposing positions was moving towards reaching a level of "unifying the technical hierarchy, trademark holders, and larger telecommunication and information technology companies around a common agenda" (Mueller, 2002, 171).

In these circumstances, the U.S. government (DoC, NTIA) issued a public-policy statement titled *Management of Internet Names and Addresses* (The White Paper) (June 1, 1998). The White Paper presented a surprisingly open approach to DNS management

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be out of luck... [T]he government gives greater credence to the companies that have lobbied to run registries for particular new TLDs... [but] squelches the ambitions of those who favor a free-for-all marketplace in which anyone could create new TLDs". Citing French sources, she added that "[t]he French are lobbying hard within the EU for coordinated opposition to the Green Paper plan ... this position is supported by Spain and Italy, less so by Germany, and opposed by Britain and the Scandinavian countries".

[218] See http://cse.stanford.edu/class/cs201/projects-97-98/domain-names/proposals/us.html.

[219] In Mueller's (2002) interpretation of the events, Magaziner, "who had been in close communication with Postel and other IAB members during the preparation of the Green Paper, came to agree that the new governance organization should be a continuation of the existing IANA" (171), and the board should be internationally representative. Behind this "change of heart" was, apparently the recognition that "[w]inning the support of Postel and the technical community would bring into the fold an international network of stakeholders with control of important resources. This included the regional address registries in Asia and Europe, root–server operators in London, Norway, and Japan, and many operators of country-code top-level domains (ccTLDs)" (172). On the other hand, the technical hierarchy was beginning to recognize that "it had to come to terms with the ongoing U.S.-government proceeding" (171). The U.S. government was seen as "the bridge between the U.S. corporate and technical groups and other national governments and international organizations" (172).

privatization, and was acclaimed by most of the "dominant coalition" members.[220] While not prescribing the composition of the Board, the White Paper was specific about some constitutional issues: 1/ seven stakeholder groups would be represented on the Board; 2/ government officials would not be allowed on the Board; 3/ the corporation would conduct an open and transparent decision-making process.

For once, the G7 governments were ready to support a project which seemingly had less direct U.S. government involvement and delegated policy-setting role to an inter-governmental organization – the WIPO.[221] As, in principle, the gTLDs were perceived as U.S.-controlled spaces, the delay in the domain name space expansion by adding new gTLDs, combined with the opening of the NSI's domain name databases for new registrars, was seen as a fair policy move.

In effect, by facilitating the negotiations[222], and being the most important player in them, the U.S. government had assumed the role of the convener of a collaborative policy-development process. It had successfully worked on creating the preconditions for a consensus-aimed process: 1/ leading the behind-the-scene negotiations to the stage of "a common agenda" and "a tenuous peace", which are organic elements of any collaborative consensus process; 2/ identifying the stakeholder groups with the best articulated claims; 3/ designing an institutional framework for the consensus process; 4/ creating, seemingly, an egalitarian decision-making regime, by inserting structural elements of "shared

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[220] Mueller (2002) includes in the "dominant coalition" the ISOC-led technical community and the GIP-assembled business interests (173).

[221] Under the EU pressure, the U.S. government decided to ask the WIPO to conduct a global consultative process leading to both a uniform dispute resolution system and protection of famous trademarks in new TLDs.

[222] According to Mueller (2002), the White Paper was a bargain policy statement, capable of satisfying a coalition of some of the most powerful claimants, who, "[b]ehind the scenes… had made a tenuous peace" (174).

power" (international stakeholder representation), and eliminating authoritative governmental participation.

The process of designing the new self-regulative order "by consensus" was then left to the stakeholder groups. The U.S. government reserved only the right to recognize the new corporation as a consensus-based entity, and to transfer to it the responsibilities hitherto performed, on a contractual basis, by the NSI and IANA.[223]

Because of the consistent way in which the government had been developing the concept of privatization, the White Paper's call for self-organizing initiated a real worldwide movement among the participants in the DNS controversies.

4.3.3.4. The International Forum for the White Paper (IFWP): a genuine attempt to self-organize

By mid-June 1998, in response to the U.S. Government White Paper on the Technical Management of Internet Names and Addresses, a coalition of Internet stakeholders was created, named the International Forum on the White Paper (IFWP).[224] Its mandate was to sponsor a framework of coordinated international meetings, to be held around the world, at which stakeholders would discuss the transition to private sector management of the technical administration of Internet names and numbers.

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[223] The fact that the U.S. government contracts with NSI and IANA expired in 1998 added to the urgency that characterized the U.S. government dealings with the Internet DNS privatization.

[224] The IFWP conceived of itself as "an ad hoc coalition of professional, trade and educational associations representing a diversity of Internet stakeholder groups, including ISPs, content developers, trademark holders, networkers, intergovernmental groups, policy experts, end-users and others". Initially, 22 associations around the world representing diverse Internet interests officially supported the IFWP framework. The coalition-member list is published on the IFWP website: http://www.ifwp.org/.

More than a thousand people participated in the four regional meetings, sponsored and organized by the IFWP.[225] The meetings produced a set of consensus points and proposals (see IFWP, 1998) regarding the mandate, structure, and functions of the new corporation. The model that emerged as a result of these enthusiastic gatherings embedded both the principles of private sector, free-market-driven self-regulation promoted by the U.S. government, and the participatory, all-inclusive, interactive (and, hence, open, transparent, and publicly accountable) process of self-governance practiced by the Internet communities.

The IFWP series of international meetings was supposed to culminate in a final conference in Boston, scheduled for mid-September 1998, to be held at the Berkman Center for Internet and Society at Harvard Law School. Only a week before that, though, it was announced that "discussions are underway between IANA and NSI", which "have been succeeding very well, quite beyond the stage of principles", and "both parties feel that the September 12-13 meeting is not needed". What transpired was that, in parallel with the IFWP process, IANA and ISOC were working on draft articles of incorporation and bylaws for the new corporation.[226]

As the IFWP process was approaching a "constitutional convention" point (the so-called Boston Editorial Meeting planned for mid-September), the dominant coalition –

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[225] The meetings were held in Reston, Virginia, USA (July 1-2, 1998), with more than 200 participants from North and South America, Europe and Asia; in Geneva, Switzerland (July 24 – 25); in Singapore (August 11 – 13); and in Buenos Aires, Argentine (August 20-21), where 140 people registered coming from Brazil, Chile, Uruguay, Bolivia, Peru, Mexico and Argentine.

[226] Joe Sims, the antitrust counsel hired by Postel, was developing a public-benefit corporation model, which vested significant power in the board and management and reduced their accountability to a community of stakeholders. A structure of three supporting organizations was proposed, whose primary function was developing and recommending to the Board substantive policies. Two of the supporting organizations represented the Internet technical community (addresses and protocols) and the other one was, presumably, intended for business and user representatives. The resulting prevalence of the technical community on the Board would, apparently, ensure a dominating position for that community in the policy-setting process – a feature that this model shared with the gTLD-MoU project.

IANA and GIP – felt its hegemony over the incorporation process was threatened.[227] To solve this, the legal teams of the two major adversaries – IANA and NSI - entered into private negotiations.

Soon thereafter (September 17, 1998), the IANA and NSI jointly released draft Articles of Incorporation and Bylaws of an Internet Corporation for Assigned Names and Numbers (ICANN), which was a rather surprising move for most of the IFWP participants.[228] It had been a well-known fact that the gTLD-MoU effort was inspired by the technical cadre's (the so-called "old boys") condemnation of NSI's registration-market exploitation, and, hence, dismantling NSI's monopoly was the guiding aim of the White Paper project.

In the IANA/NSI joint statement there was an explicit recognition of the IFWP contribution to the process of transition in Internet management: "The goal was to capture the best ideas from all sources, including the International Forum for the White Paper (IFWP), the business community, the Internet technical community and other stakeholders". In reality, Postel did not fully participate in IFWP[229], and the reference to the IFWP process was needed to legitimize the IANA proposal, produced in secrecy.[230]

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[227] As Mueller (2002) comments, "[t]o subject Sims's and Postel's incorporation proposals and interim board selections to approval and modification by an open, international forum that included many opponents and critics would be to risk losing control over the results" (178).

[228] For the non-American participants in the IFWP process, the events leading to the creation of ICANN constituted "a kind of a dark history", as Oscar Alejandro Robles-Garay, the ccTLD Registries Constituency representative on the DNSO NC, put it: "Nobody knows for real what actually happened in those days. Somebody says that Joe Sims and Jon Postel had already had the names [of the Interim Board members] from the beginning. And, the names that the other groups were proposing were just put aside and were not taken into account" (interview with the author, May 23, 2002). Indeed, until mid-September, IANA and NSI had released independently earlier drafts of their submissions. With the deadline approaching, and engaged in more than two weeks of private, behind-closed-door, intense discussions, they produced a set of drafts defining the new corporation (IANA, 1998).

[229] As representing major stakeholders, the leaders of IANA and NSI were personally invited to participate in the IFWP regional meetings. Postel, though, made only a brief appearance in Geneva, at the opening session, along with Magaziner. At the Buenos Aires meeting, a letter from Postel, addressed to the meeting, was read to the audience. There was a video, as well, with a message from Magaziner. NSI's

Despite the decision to cancel the forthcoming meeting, a group of nine IFWP Steering Committee members (Boston Working Group) met in open session in Boston, Massachusetts (September 19, 1998). The meeting had a single focus: "to review and critique the document [the IANA/NSI draft] and report back to the community... within the short time allowed for comments" (BWG, 1998). As a result, the Boston Working Group issued a proposal titled "The Boston Meeting Consensus for Changes to the IANA/NSI Draft By-Laws", which was seen as an alternative to the IANA/NSI proposal, for it was brought "into alignment with the international consensus".[231]

When the last version of the joint IANA/NSI Draft was released, the Boston Group sent a letter (September 28, 1998), with its consensus document attached, directly to the Office of the President, NTIA, and U.S. Department of Commerce (DoC). There was a clear dissatisfaction with the Draft as it still lacked the necessary system of democratic checks or balances.[232]

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representatives, on the other hand, were involved in IFWP discussions from the very beginning (see Lessig, http://cyber.law.harvard,edu/works/lessig/cpsr.pdf).

[230] In the letter accompanying the ICANN Articles of Incorporation and Bylaws, which was sent to the NTIA (October 2, 1998), Postel presented IANA's role in the "extensive process of discussions and negotiations among a large number of interested people and organizations" that had followed the release of the White Paper as "the scribe, recording to the best of our ability what we understood to be the community consensus as it developed" (IANA 1998, 2). In complete detachment from the reality, he expressed the belief that the documents did "in fact command the support of a broad consensus of Internet stakeholders, private and public".

[231] There were eight areas where an attempt was made "to enhance the NSI/IANA proposal": the goals of the new enterprise; not for profit tax status; the membership structure; the role of the supporting organizations as policy advisors; the size of the company; conflicts of interest; the balance between the Bylaws and the Articles of Incorporation; and the initial board.

[232] It was stated in the letter that the document continued to reflect an organizational structure that would have "vague lines of accountability, limited, if any, means for individual participation, have a high degree of susceptibility to capture by companies and organizations, and finally is not guaranteed to ever have a membership structure" (BWG, 1998). Furthermore, the Boston Working Group's criticism of the IANA/NSI Draft was that it "is neither a product of the IFWP process nor does it conform to the IFWP consensus points", and, finally, "nor does it meet the standards required by the NTIA White Paper, either in terms of content or the process through which that proposal was derived" (Auerbach, 1998). Because of the open process of generating ideas, the group claimed that its submission represented a real consensus of the Internet Community and a true response to the NTIA White Paper.

By the deadline established by the White Paper (September 30, 1998), the U.S. DoC was facing a rather complicated situation. Instead of dealing with a single consensus-based proposal for the new corporation, it was presented with at least four such proposals.[233] Among them, the IANA/NSI's one was at the most advanced level, as a corporation under the "ICANN" name had already been registered in California, and an Interim Board of nine directors had been selected and convened.[234]

The IANA/NSI proposal, as well, differed significantly from the rest, because it did not envision a membership, but a trusteeship organization. This fact unequivocally confirmed the existing divisions in the Internet stakeholder community, based on differing models of self-governance (technical elite as public trustees vs. informed stakeholder participation and collaboration).[235]

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[233] Besides the IANA/NSI proposal, there were submissions, as well, from: 1/ the Boston Working Group, which summarized the consensus points of the IFWP process; 2/ the Open Root Server Confederation (ORSC), which proposed a membership corporation, but composed primarily of organizations; 3/ the Electronic Frontier Foundation, which insisted on guaranteeing the freedom of expression, 4/ the European ISP Association, which proposed a structure similar to ORSC's.

[234] The U.S. GAO review (2000) on the relationship between the DoC and ICANN found out that "the late Dr. Jon Postel was primarily responsible for the selection of ICANN's interim board,... after Dr. Postel, acting for IANA, invited and considered suggestions from the Internet community". In addition, the DoC "did not participate in the consideration or selection of proposed ICANN interim board members" (GAO, 2000). The Interim Board selection, which itself was a subject of tense private negotiations (see Mueller, 2002, 180-181), was done on the principles of 1/ geographic and functional representation, and 2/ avoiding persons, who had been actively involved in the hitherto DNS debates, and, for this, were potentially controversial figures. The creation of a board of neophytes was used later by the Management to influence the pace and direction of the discussions on particular policy issues. Of the nine directors, three were Europeans, and two from the Asia/Pacific region – Japan and Australia; the remaining four U.S. representatives came from academic, computer industry, and electronic trading circles (see the list of the ICANN Interim Board members at http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/bios.htm). In some comments to the proposals, the lack of board members representing Latin America and Africa, or a non-OECD country, for that matter, was pointed out (see "Comments on Proposals", http://www.ntia.doc.gov/ntiahome/domainname/proposals.comments.dns10798i.htm). Thus, Australian Senator Richard Alston argued in his letter to NTIA that "[u]sers in the Asia-Pacific account for 15 percent of global users of the Internet, while users in the European Community account for just over 17 percent (North American countries account for 60 percent)." Hence, he suggested that "the balance between European and total Asia-Pacific representation on the interim board should not be equal" (http://www.ntia.doc.gov/ntiahome/domainname/proposals/comments/scanned/alston.htm).

[235] After a thorough examination of the proposed models, Prof. Tamar Frankel (1998), the IFWP Chair and an expert in corporate governance, concluded that the ICANN model of a public-benefit corporation was

Although the IANA/NSI proposal did not enjoy broad acceptance from the involved parties, it could not be ignored, given the important DNS resources commanded by the two major stakeholders: NSI was claiming intellectual rights on the database of *.com, .net,* and *.org* registrants[236], and IANA/Postel was the depository of expertise, experience, and authority recognition by the global network of Internet name and number space operators.[237]

Because of this, the DoC accepted the IANA/NSI proposal. Nevertheless, Postel and Sims were instructed to refine the proposal in order to accommodate the concerns expressed by the opponents.[238] The Interim Board followed the direction, and after a teleconference with representatives of those two entities (in late October 1998), particular concessions to the membership model were made, as is discussed further.

Meanwhile, the DoC and NSI agreed to amend their cooperative agreement (October 6, 1998) instead of eliminating it after its expiration at the end of September 1998 (see U.S. DoC, *Amendment 11*). For the privilege of continuing the market exploitation of the lucrative gTLD databases, NSI had to agree to: 1/ design a shared registry system, and, thus, allow access of competing registrars to *.com, .net,* and *.org*

"entirely inappropriate", because it vested in the board virtually unrestricted powers to manage, structure, and restructure the corporation, and did not ensure a balance of power among the different stakeholders, and even negated the existence of stakeholders. As the new corporation's mandate was similar to that of a business corporation, and not a charitable entity, the model proposed by the White Paper and the IFWP consensus, which envisioned a nonprofit membership-based organization, was more appropriate. According to this model, directors were elected and accountable to members; they were required to conduct an open and transparent process; and membership could be structured to create a protection against capture. On this basis, Frankel predicted, "In my opinion, the current ICANN is not legitimate nor trustworthy ... Clearly, mistrust is mutual. Those in power do not trust those who are excluded either. Without some cooperation and trust I doubt that ICANN will go far. Perhaps it is too early for self-governance".

[236] The control over nearly three-fourths of the global domain name market provided NSI with unprecedented bargaining power.

[237] As Mueller (2002) stated, with the untimely death of Postel (October 18, 1998), IANA and the dominant coalition lost their "most valuable asset" (181).

[238] In a letter to ISI (October 20, 1998), Becky Burr (DoC) wrote: "we urge you to consult with these groups [the BWG and the ORSC]... to try to broaden the consensus" (cited by Mueller, 2002, 293).

domains; 2/ separate its registrar (retail) operations from its registry (wholesale) functions into independent divisions; 3/ make no changes to the root (by adding new gTLDs, for instance) without written authorization from the U.S. government; 4/ recognize and enter into a contract with the new corporation.

In summary, the process of implementing the model of a private DNS-management corporation, as outlined in the White Paper, was concluded, notwithstanding the fact that the consensus process had gone astray.[239]

The White Paper established a rather tight four-month timeline for a, presumably, global collaborative process. Moreover, as the deadline approached, a shared perception of the U.S. government "rushing" to incorporate the envisioned new entity began to emerge.[240] One of the widespread beliefs at the time was that the U.S. government wanted to transfer the responsibility for a complicated, yet essential technical infrastructure to the private sector, as soon as possible, in order to extract itself from the political and economic controversies related to it.

The above-outlined developments in 1997 and 1998 suggest, in addition, that, for a certain period of time, the U.S. government had to compete with the ISOC/ITU alliance for authority over the emerging regulative regime in the domain-name space, as the implementation of the gTLD-MoU had already begun.

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[239] Although time-deficient, the IFWP process was really inclusive and consensus oriented. It had a lasting impact on the formative stage of ICANN, as 1/ it constituted the strongest reference point, when the Board/management's faults were criticized; 2/ consolidated individuals and organizations around the world as participants with stakes in the Internet DNS governance; 3/ was able, with the U.S. officials' help, to impose certain requirements, belonging to the participatory democracy model, such as building a membership organization, and 4/ produced a united front of critics, as for many opponents of ICANN, in the next four years, the IFWP was the entrance to the Internet governance debate.

[240] Indeed, among the factors that constrained ICANN's functioning in its formative stage, Michael Roberts, the first ICANN President and CEO, pointed out to the following: "The DoC was in a great hurry to get ICANN operational, and, essentially, to get itself out of the business of trying to run the DNS… It was only the fact [that] the DoC was in such a hurry and that was such an emphasis on the bottom-up structure that led us to believe that we could go ahead and start up without having the rest of the organization in place" (interview with the author, February 20, 2002).

I would argue, though, that U.S. foreign trade strategy in the 1990s provides a more plausible explanation of the U.S. government's hastiness to recognize a private entity as the new corporation. Based on the already presented analysis of the political context in which the DNS management privatization policy was developed, an assumption can be made that, by the end of September 1998, the privatization of the Internet DNS had acquired higher stakes for the U.S. government in its global e-commerce power-play.[241] A successful self-governance regime, involving a broad array of global stakeholders, would have augmented the U.S. chances to persuade their opponents to remove the government-guaranteed online consumer privacy protection.[242]

In conclusion, the historical period initiated by the U.S. government's involvement in the Internet DNS controversies and ending with the inauguration of ICANN (1997 – 1998) was characterized by polarization of stakeholder positions regarding the type of governance. Reflecting the level of the penetration of the Internet into different geographical regions and countries, and the historical legacies of its creation, a strong pro-U.S.-control view was in competition with a more international-involvement position. Although both visions were internally incoherent, the former had a better chance of, ultimately, dominating the debate, as it coincided with the U.S.

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[241] Arguably, these stakes would rise so high by the end of September 1999, when a three-way ICANN-DoC-NSI agreement was made, that the Commerce Department would openly state that it "has no plans to transfer to any entity its policy authority to direct the authoritative root server" (NTIA, 1999).

[242] The European Privacy Commission Directive was to go into effect on October 25, 1998, thus, impacting the transactions of millions of U.S.-based corporations. Commenting on this development, Gordon Cook (1998), a strong ICANN critic, speculated that "Ira [Magaziner], I fear, is using the internet as a pawn in a far bigger game", because he needed "to consolidate American control over the Internet in order to use that control as a bargaining chip against the Europeans and Asians to be able to force them to capitulate to American corporate demands in the EC privacy disputes coming to a head October 25 and with this action to gain leverage for the Clinton administration's crypto policies which although, Ira says at home he does not support, he like a good soldier carries out abroad". And, referring to the upcoming OECD meeting in Ottawa on October 7, 1998, Cook stated that the U.S. Administration needed to demonstrate to its trade partners that it had enough power to design and implement a solution at home: "Ira is determined to confront the OECD next week with an Internet that HE and the White House clearly control".

government's long-term foreign trade strategy of removing barriers, imposed by protective national governments to the global flow of information and commerce.

In fact, the "less government" model for the new corporation did not meet real opposition[243], and it was mainly between the proponents of different versions of "self-regulation" (who were, predominantly, U.S. players) to negotiate the boundaries for individuals' participation/representation in the corporation, the desired level of accountability of the board to the stakeholders, and, overall, the type of self-regulation (a public-trustee corporation vs. an informed-stakeholder-participation corporation), as the participants were clearly divided on this issue.

The following three chapters are devoted to an in-depth analysis of the power dynamics intrinsic to the implementation of the collaborative design. Following three distinct lines of development in ICANN's formative years, the investigation reveals the stakeholder positions and strategies that influenced the process and the policy outcomes. The lines of development are:

1/ Establishing ICANN as a legitimate source of control over the Internet root, which required the U.S. government to both officially delegate authority over the management of the Internet DNS to ICANN, and convince the principal stakeholders to enter into contractual relations with ICANN (delegation and recognition of authority).

2/ Implementing the White Paper multistakeholder collaborative consensus-building model by resolving controversial organizational, structural and procedural

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[243] Opinions in this group of comments ranged from eradicating the DNS privatization project to urging the U.S. government to keep, at least, its responsibility of overseeing the new regime of governance (see, for instance, Ronda Hauben's (1998) Proposal to NTIA to establish an International Public Administration for the DNS management, or Lawrence Lessig's (1998) Review of the ICANN proposal, sent to Magaziner on October 7, 1998, where he urges the U.S. government to guarantee that "the values of our government not get lost in this hand-off to private interests".

issues, such as achieving balanced stakeholder representation on the Board of Directors, building individual and organizational membership capable of electing At-large Board members, etc. (gaining public legitimacy via accountability).

3/ Developing substantive policies according to the agenda outlined first by the U.S. government in the White Paper (June 1998), and generated under pressure exerted from the trademark owners, big U.S. businesses, and prospective domain name registrars.

In retrospect, neither of those lines had approached the point of completion by September 30, 2000, which was the date designated by the U.S. government for the transfer of full authority over the root to the new corporation; hence, the consecutive three-time extensions of the Memorandum of Understanding (MoU) between ICANN and DoC, until 2002, when a sweeping structural and procedural reform was initiated by the then-President of ICANN, Stuart Lynn.

The following analysis of ICANN's four-year formative stage traces these three major lines of development by recreating the chronological process and by focusing on its power dynamics.

Chapter 5. Legitimizing ICANN: knitting the contractual web for the principal stakeholders

This Organization [ICANN] will be unique in the world – a non-governmental organization with significant responsibilities for administering what is becoming an important global resource.

Jon Postel, Letter to NTIA
introducing the ICANN constitutive documents,
October 2, 1998

Although a globally distributed communication network, the Internet does have a single point of control – the authoritative root, and ICANN was created in late 1998 to govern it. The U.S. government faced the historical challenge of legitimizing the new corporation, since, for the first time a global resource – the Internet name and number space - was entrusted to the private sector to manage it in the public interest. As was argued in Chapter 4.2.3, for the U.S. government, it was of vital importance to demonstrate that the self-governance principle could be successfully applied to the Internet, which, meanwhile, was consistently conceptualized as a global marketplace.

Since the multistakeholder collaborative model of self-governance was the one endorsed for the Internet DNS privatization, the new private corporation needed the authority of an entity both blessed by world governments and accepted by the private sector/civil society stakeholders, and capable of implementing its decisions. The promising formula consisted in creating policies by generating consensus from diverse

and proportionally represented stakeholders, who, then, would comply with their own decisions.

The governance model that ICANN was expected to implement relied on two principal sources of authority[244]: 1/ authority delegated by the U.S. government[245] 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 – gTLDs and ccTLDs). As a regulator, to gain policy-implementation power, ICANN needed to develop a network of contractual relations with both sources.

5.1. The U.S. government recognizes ICANN

As we saw in the previous chapter, the Internet community was polarized as a result of the private negotiations between IANA and NSI that had precluded the IFWP

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[244] In the early stage of the Green Paper discussion, Magaziner (1998) suggested a third approach in "solidify[ing] the legitimacy of this group" (the envisioned new private entity): "One of the things we discussed with the EU and Japanese government[s] – when [the] new organization forms, we, the U.S. government, will recognize its authority, and the EU, we suggested, may issue a statement to recognize it, and the Japanese, and so on. So that you have some sort of formal process, where the governments would have recognized that this new body has this authority. That would then limit the way in which the governments would intervene". Later, the world-governments' recognition of ICANN was achieved in a rather engaged way, via participation in the Government Advisory Committee (GAC), which, as discussed further, was not a neutral observer of the ICANN process, but tried to influence it by issuing communiqués on particular issues.

[245] Some U.S. legal scholars, though, have argued that "[b]ecause the U.S. government's authority over the DNS was murky, ICANN could not derive legitimacy from its designation by the government as the entity assigned to perform both ministerial and policymaking DNS functions" (Weinberg, 2000, 11). See also Froomkin, 2000. Rejecting the term "privatization", referring to the Internet DNS management, as "a rhetorical cloud", Mueller (2002), nevertheless, recognizes that "[w]hat the Commerce Department has turned over to ICANN... is not ownership of a service or asset [which is the normal meaning of the word "privatization"] but the authority to develop policies and to legislate binding rules for the domain name registration industry" (211). In fact, Ira Magaziner stated on February 17, 1998 that "[t]he U.S. government has legal authority over DNS and the root servers for historic reasons. It has been run by Jon Postel and NSI. Contracts are coming to an end in December 1998, and the U.S. government wants to end its authority over this".

from submitting a consensus-based proposal to the NTIA. Taking this into account, the U.S. DoC conditioned the official recognition of ICANN on the requirement that the Interim Board contact the parties whose voices had been ignored, namely, the Boston Working Group (BWG) and Open Root Server Confederation (ORSC). The areas of concern were: 1/ establishing an open-membership structure, 2/ financial accountability to the members of the Internet community, who would be funding the corporation, 3/ transparency, 4/ conflicts of interest, 5/ geographic and functional diversity of the Board, and 6/ preserving national governments' authority to manage or establish policy for their own ccTLDs (see *ICANN Correspondence*, Dyson, November 6, 1998).

The parties collaborating in the IFWP did not constitute, individually, major stakeholders in the emerging regime.[246] Even their respective stakes in the Internet DNS management were not clearly defined, and, thus, for them, it was difficult to combat the agenda-driven organized efforts of the dominant coalition. Nevertheless, ICANN's legitimacy depended on their involvement, as, by definition, the inclusion and participation of global stakeholder groups was to compensate for the lack of government participation. After all, ICANN was "sold" by the U.S. government to its foreign trade partners as an embodiment of effective industry self-regulation, functioning on a consensus basis.

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[246] Craig Simon, a student of ICANN, for instance, provides the following comment: "Vociferous opposition to ICANN came from small groups such as the Domain Name Rights Coalition (DNRC), Open Root Servers Confederation (Open-RSC) and the Boston Working Group (BWG). Open-RSC is dominated by individuals who had been outspoken MoUvement [the gTLD-MoU initiative] critics. The BWG largely reflects the same veteran anti-MoUvement constituency as Open-RSC, but with a few notable exceptions such as Karl Auerbach, a founding BWG member who was also a CORE supporter" (Simon, 3). The IFWP, indeed, had proven to be the main entrance to the DNS regulation area for hundreds of non-U.S. representatives of Internet technical community, prospective local and regional ISPs, and non-profit organizations.

Under U.S. government pressure, the newly seated ICANN Board began consultations with the Internet community to attempt to co-opt the most critical voices into the process. A conference call with representatives of the BWG and ORSC (October 31, 1998) provided them with the opportunity to express their frustration with the way the global open and inclusive consensus-building process had been derailed by the private negotiations.[247]

Despite the emotionally charged and near-chaotic exchange of opinions over the phone, the opponents succeeded in influencing the Board to revise its Bylaws in order to include the following issues in its accountability mechanisms: a membership structure, with directors elected from three specialized supporting organizations and an at-large membership; an Advisory Committee on Membership; and the broadening of the financial accountability by identifying the anticipated revenue sources and levels, and disclosing the payments to the directors (see BM 31 10 98).[248]

To further convince the DoC that its constitutive documents had gained consensus support from the broader Internet community[249], the ICANN Board organized two open public meetings - in Cambridge, Massachusetts (November 14, 1998) and in Brussels, Belgium (November 25, 1998) - hosted by the European Commission, and under the auspices of the European Community Private Sector Panel of Participants (EC – POP).[250]

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[247] The opponents charged that the Board had not been selected in an open process, which, in their view, made the IFWP the only legitimate party to elect Board members (see BM 31 10 98).

[248] See *ICANN Correspondence*, Dyson, 1998.

[249] In the press release following the first meeting (November 15, 1998), Michael Roberts, ICANN's Interim President, openly expressed the hope that "we now have the basis on which to move forward with a transition agreement with the U.S. government and to address the lengthy list of ICANN action items" (*ICANN Announcements*, November 16, 1998).

[250] At the European meeting, where the Board was largely welcomed and ICANN was accepted as taking on the IANA's legacy, the uneasiness between the representatives of the established technical expertise and the newcomer stakeholders was palpable. The Internet Architecture Board (IAB) representative, for instance, conveyed the expectation that the IETF's "influence on policy decisions that affect the assignment

On these three occasions, the neophyte board members were exposed to the rather complicated relations among the stakeholders and the differing expectations of ICANN.[251]

The ultimate goal of the Interim Board was to speed up the transfer of policy authority from the U.S. government to ICANN. The improved Articles of Incorporation and Bylaws were promoted as "the product of a broad if somewhat laborious consensus", and the U.S. government was asked "to officially recognize ICANN" by "quickly negotiat[ing] the necessary transition agreement with the Corporation" (see *ICANN Correspondence,* Dyson, 1998).

This is early evidence of the confused self-perception of the Interim Board (and the dominant coalition behind it) as guardians of public resources, whose policies and management decisions derived from public consensus. Contrary to the White Paper's consensus model, which introduced the notion of stakeholder self-governance, the ICANN-builders, apparently, envisioned, from the outset, a centralized policy-making process based on consultations and input from the so-called stakeholders. In this light, the opponents' insistence on representative mechanisms (an elected Board) clashed with the

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and registration of IETF protocol parameters" would be guaranteed (see "EC-POP Meeting with ICANN Board Members", 1998). The representatives of the European ccTLDs, who, historically, had been linked to IANA, required "slow change" in ICANN's policy towards the country-code registries. They were concerned that, because the U.S. NTIA had been "asking for explicit attention for the most vocal groups" [evidently, the BWG and ORSC], the voices of the technical expertise groups, such as the Council of European National Top-Level Domain Registries (CENTR), would be ignored. In the domain-name supporting organization, they could be concentrated in the "back room", while "the rest of the house is just for policy and representation....". In addition, the commercial users imposed on ICANN their expectations of trademark protection, consumer protection, and, even, Internet-content protection policies.

[251] At the U.S. meeting, the issue of trust emerged as key for a successful implementation of the consensus organizational model (see *ICANN Announcements*, November 16, 1998), and, consequently, the revised Bylaws, sent to the NTIA on November 23, 1998, contained a number of mechanisms adopted from the consensus model, such as holding quarterly open public meetings in conjunction with each regular Board meeting; publishing the complete minutes of formal voting Board meetings, which were still closed; and developing a mechanism for the reconsideration of Board decisions (see *ICANN Announcements*, November 23, 1998).

view of a trusteeship management of ICANN, which was persistently promoted by the senior Staff members, and, ultimately, was accepted with President Lynn's Reform Plan in 2002.

Equipped with some first-hand knowledge of the differing, and often conflicting, positions of the best consolidated stakeholder interests, the Interim Board proceeded to press the DoC to sign an agreement with ICANN.[252] On November 25, 1998, the DoC entered into a Memorandum of Understanding (MoU) with ICANN to "jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and steps necessary to transition management responsibility for DNS functions" to a private-sector entity. The MoU built on the same four principles that the White Paper proclaimed: stability, competition, private bottom-up coordination, and representation. The document stated that "[o]nce testing is successfully completed, it is contemplated that management of the DNS will be transitioned to the mechanisms, methods, and procedures designed and developed in the DNS Project" (*Milestone Documents*, November 25, 1998). [253]

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[252] ICANN's readiness to fulfill the requirements of an open and transparent process imposed by its critics was negotiated in November 1998 between the newly appointed Board (and Joe Sims as ICANN's counsel) and the DoC, with Magaziner and Burr functioning as personally involved brokers. On November 6, 1998, in the "Transmittal Letter to Burr" accompanying the revised Bylaws, Esther Dyson confidently stated that "ICANN is prepared to fulfill the mission identified in the White Paper (see *ICANN Correspondence,* Dyson, 1998). Magaziner's opinion, though, was that "[w]hile we think the ICANN board has made progress in responding to the letter we sent them, we don't feel that they've sufficiently addressed the issues of openness and accountability" (see *Journalistic Articles,* McCullagh, November 18, 1998). The BWG, whose members Magaziner had consulted with in a conference call, insisted on removing qualifications for Board members and electing all directors, opening the Board meetings to the public, providing ways for the public to appeal the corporation's decisions, making transparent the voting process and results. Dyson (1998) was even more insistent: "We believe we are now fully prepared to fulfill the mission identified in the White Paper...[W]e need all parties to recognize our authority as valid and our decision-making as fair, objective and transparent... Accordingly, we are now asking the U.S. government to officially recognize ICANN, and the enclosed documents, as the product of a broad if somewhat laborious consensus, and to quickly negotiate the necessary transition agreement with the Corporation..." (see *ICANN Announcements*, November 23, 1998).

[253] In essence, the MoU established ICANN as the partner in the joint project to run for approximately 22 months, through September 30, 2000. How unrealistic the DoC's expectations were in regard to the time

5.2. Incorporating Network Solutions into the new regime

Among the stakeholders most likely to contest ICANN's newly-acquired authority was Network Solutions, Inc. (NSI), which operated the Internet "A" root server.[254] The notorious animosity between the Internet technical elite and this U.S. government contractor was based on incompatible aspirations towards the Internet, and there was no reason to expect that NSI would readily recognize ICANN's authority over its monopoly market position. Indeed, although, by February 1999, the DoC had entered into contractual relations with both parties – ICANN and NSI - and, in Amendment 11 to the Cooperative Agreement with the NSI (October 6, 1998) the U.S. Administration had laid the ground for a smooth transition of authority to the "NewCo"[255], NSI was in no hurry to both foster the emergence of a competitive registrar market and give up its autonomy.[256]

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necessary to complete the transfer of responsibility from the U.S. government to the private corporation becomes evident from the fact that each ICANN report, since the second one, issued on June 30, 2000, was followed by certain amendments and, consequently, a year-long extension.

[254] The economic power of NSI increased enormously in 1998: 1/ as the domain name registration business blossomed, the NSI's stock had risen from less than $20 a share to $140 a share, and its revenue reached $120 million a year (see *Journalistic Articles.* Marson, July 26, 1999); 2/ the number of registered domain names in *.com, .org,* and *.net* was twice as many as the previous year; 84 percent of the cumulative total registrations were in *.com* alone, and 70 percent of the new registrations went to U. S. businesses and individuals (see *Journalistic Articles.* January 12, 1999).

[255] In early October 1998, when Amendment 11 was signed, the NSI agreed that "[f]ollowing the finalization of the agreement between the USG and NewCo, NSI will recognize NewCo pursuant to a contract between NSI and NewCo. NSI acknowledges that NewCo will have the authority, consistent with the provisions of the White Paper and the agreement between the USG and NewCo to carry out NewCo's Responsibilities" (U.S. DoC, October 6, 1998). In addition, NSI agreed to participate in the plan for creating a competitive gTLD-registrar market by designing a shared registry system (SRS) for *.com, .net.* and *.org.*

[256] Indeed, on the weekend of March 20-21, 1999, NSI redirected the queries of the name www.internic.net to resolve to its website www.networksolutions.com, thus asserting its ownership over the "A" root database. This generated a storm of protest from ISPs and network operators, and potential registrars that "the name (internic) should not devolve to the monopolist incumbent" (see *Journalistic Articles.* Kendall, March 26, 1999). Arguably, this was a reaction to the March ICANN Singapore meeting's decisions over establishing rules and a time table for accrediting five new registrars, where NSI was asked to open its

The First ICANN Status Report to the DoC (June 15, 1999) contained a page-long list of accusations that NSI was sabotaging the organization's efforts to create a competitive domain name registration market.[257] The report concluded that "NSI has generally been an impediment, not a help, in the transition from government-controlled monopoly to a private competitive DNS... ICANN and DoC are taking prudent steps necessary to be able to implement the White Paper objectives with or without the cooperation of NSI" (*ICANN Status Reports*. June 15, 1999).

By the summer of 1999, NSI had become the ultimate "bad guy", and not only for the ICANN Board members. At 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 *Journalistic Articles*. Marson, July 26, 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 *Journalistic Articles*. Dawson, July 8, 1999).

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databases on April 26. Nevertheless, this act was consistent with NSI's claims of intellectual property ownership over the content of the "A" root server database.

[257] Among these accusations were: 1/ NSI had delayed the development of workable interfaces for the shared registration system (SRS), and demanded "overly broad intellectual property protection and various other restrictive license terms for the SRS"; thus, the end of the testbed period and the beginning of fully competitive registrations, had been delayed as well; 2/ NSI had refused to accept the ICANN registrar accreditation policies and asserted that it should not have to comply with the same accreditation standards that apply to other registrars; 3/ NSI had "refused to accept the policy authority of ICANN, although it continues to 'participate' in the creation of ICANN institutions and policies" (*ICANN Status Reports,* June 15, 1999).

Under such public pressure[258], and with the expiration date of its Cooperative Agreement with the DoC approaching, NSI yielded, and a set of three-party agreements[259] was signed between DoC, ICANN, and NSI in November 1999.[260] The contractual authority of NSI to operate the legacy gTLD registry (the "A" server) was extended for four more years.[261] NSI was given, as well, a powerful financial incentive in order to separate ownership of the registry from its registrar operations within 18 months: if it did so, the registry agreement was to be extended for four more years.[262]

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[258] There were, perhaps, some behind-the-scene negotiations as well, for, as Gordon Cook reports a "secret meeting" took place on July 30, 1999, only several days after the Congressional Hearing titled "Is ICANN out of control?". The meeting was convened by the IBM Vice Presidents John Patrick (IBM Internet Division and Chair of the Global Internet Project) and Chris Caine (IBM Government Programs and Head of IBM's lobbying office) with NSI's CEO Jim Rutt. As an anonymous participant had informed Cook, in the presence of "senior Internet statesmen Dave Farber, Bob Kahn, Brian Reid and Scott Bradner", the entire purpose of the meeting was "to bully NSI into signing ICANN's agreement". In contrast, the NSI CEO Jim Rutt claimed that "[i]t was from my perspective a benign and positive sharing of points of view by some experienced people around the DNS management issue. I found it quite useful and constructive". Nevertheless, Cook concluded that "[i]t is believed that the July 30 meeting began the events that led to the late September [1999] marriage. We note that at the most critical moment in the struggle for control of the DNS system and the future of the Internet the opponents were not ICANN and NSI. It was IBM against NSI..." (Cook, 2003).

[259] These were: 1/ a Registry Agreement between ICANN and NSI; 2/ a revised Registrar Accreditation Agreement between ICANN and all registrars in *.com, .net,* and *.org;* 3/ a revised post-testbed Registrar-License and Agreement between NSI as registry and registrars; 4/ an amendment to the Cooperative Agreement between the Department of Commerce and NSI; and 5/ an amendment to the Memorandum of Understanding between the Department of Commerce and ICANN (see *ICANN Announcements,* September 28, 1999).

[260] No record of the negotiations among the three parties has been made public, but the ICANN Board meeting's minutes in the summer of 1999 contain a repeated phrase: "These draft agreements were the subject of extensive negotiations over several months among the three parties". Mueller (2002) points out that "ICANN itself had no bargaining power in this struggle. The real battle was between Network Solutions and the Commerce Department" (194). The content of the agreements was of keen interest to the various stakeholders, and, after the drafts were posted for public comment on September 28, 1999, "[a] large number of written comments were received". At the public forum during the ICANN annual meeting, on November 3, 1999, a group of accredited registrars presented a seven-point list of concerns with the agreements, which prompted "overnight negotiations", on spot (see BM 04 11 99).

[261] See *Milestone Documents,* "Approved Agreement among ICANN, the U.S. Department of Commerce, and Network Solutions, Inc", November 1999.

[262] The NSI registry agreement with ICANN was revised in April 2001. NSI (which had been sold to Verisign, Inc.) agreed to give up control over the *.org* registry, which accounted for only 8 percent of its registrations, in exchange for both four more years of control and a "presumptive renewal right" over the *.com* registry. In addition, the requirement to separate its registrar business was eliminated (see *Milestone Documents,* "Revised Verisign Registry Agreement", April 16, 2001.

Additionally, NSI was allowed to continue to operate the authoritative root server system in accordance with the directions of the DoC.

NSI had to "repay" for the favorable treatment it had received by 1/ recognizing ICANN and entering into a registry agreement with it to operate the legacy gTLD registry; 2/ promising to prepay registrar fees to ICANN of $1.25 million from a total amount of $2 million[263]; 3/ agreeing to accept domain name registrations only from ICANN-accredited registrars and not to deploy an alternative DNS root server system; 4/ becoming one of ICANN-accredited registrars for *.com, .net* and *.org* domains.

To accommodate the NSI requirements, ICANN's policymaking and implementation power was curtailed. In order to make policy decisions, ICANN had to gain a two-thirds majority on the Supporting Organizations' Councils. In addition, if the corporation could not establish contractual relations with other registries (the ccTLD registries, at the time), and NSI was competitively disadvantaged as a result, NSI could get out of its policy dependence on ICANN.

In essence, although forced to compete with a number of newly ICANN-accredited registrars, NSI remained the most powerful player in the domain name registration market. For its part, ICANN (and DoC, for that matter) succeeded in consolidating the emerging regulative regime and enhancing the corporation's policy implementation power. As Mueller (2002) concludes, "[t]hese agreements are the

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[263] Because, for most of 1999, NSI, as the only financial power in the domain name registration market, stayed out of contractual relations with ICANN, the corporation went deeply into debt. The Board reached back to an approach suggested by the White Paper – to impose a volume-based registrar fee ($1 per registered name) as a component of its cost-recovery structure. Considered, though, a "controversial" decision by the DoC (see *ICANN Correspondence,* July 8, 1999), it had to be abandoned, which left ICANN to rely solely on "voluntary contributions" ($100,000 from IBM, and $500,000 from MCI; see Mueller, 2002, 195). About the further development in ICANN's financial policy, see Chapter 5.2.3.

fundamental bargain upon which the new regime was founded, and their implementation … was the real beginning of the new system's operation" (195).

The co-opting of NSI into the new regulative regime, which Mueller defines as "assimilation", opened the way to concluding the testbed phase of the shared registry for the newly accredited rivals of NSI into *.com, .org* and *.net* registry, and to entering into a full-fledged competitive "retail" market. Also in April 1999, the first five registrars[264] signed Registrar Accreditation Agreements with ICANN, accepting a number of obligations to protect trademark interests and to contribute to ICANN's budget.

5.3. The reluctant stakeholders: the RIR and ccTLD operators

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 Registries (RIRs). Initially, the three regional IP address registries – InterNIC (later ARIN), serving North America, RIPE NCC, serving Europe, and AP-NIC, serving the Asia-Pacific region, pledged their full support for the IANA/ICANN proposal (see *Other Archives,* "Regional Internet Registries Statement on the New IANA", October 12, 1998). Historically, the RIR operators were loyal to Postel (and, hence, IANA), as they had received from him parts of the Internet address space allocated according to their established needs. Each RIR is a membership organization,

[264] These were: 1/ CORE; 2/ France Telecom; 3/ AOL; 4/ Melbourne IT; and 5/ Register.com. The fact that only a year later, in October 2000, three of these initial registrars were selected to create registries for the new gTLDs, accordingly *.biz* (Neustar and Melbourne IT), *.info* (Afilias consortium, where major partners were NSI, CORE, Register.com, Tucows), and *.pro* (Register.com), supports Mueller's claim (2002) that ICANN "rewarded dominant coalition members, particularly those that had contributed start-up money to ICANN" (188).

providing address assignments to hundreds of Internet service providers (ISPs) in a particular continent. In early February 2000, ICANN entered into a contract with the U.S. government for the performance of the IANA function (see *Milestone Documents,* "Contract between ICANN and the United States Government for Performance of the IANA Function", February 9, 2000). Thus, by assumption, the RIRs were also incorporated into the new regime. Moreover, they formed an important structural component of ICANN – the Address Supporting Organization (ASO), which signed a Memorandum of Understanding with ICANN (October 18, 1999) that envisioned contracts between individual RIRs and ICANN (see *Other Archives,* "Memorandum of Understanding. ICANN Address Supporting Organization", 1999).

Although the ASO selected three representatives for the ICANN Board (October 1999), and the RIR operators agreed to a collective share of the pre-determined portion of the ICANN operating expenses of 10 percent for the 2000 fiscal year[265], negotiating contracts with the individual operators proved a difficult task. The negotiations had stumbled over "the appropriate allocation of responsibilities for address policy formulation and implementation between regional and global forums" (see *ICANN Status Reports,* June 30, 2000).

The scope of differences, though, became evident only in 2002, when the reform process began. The RIRs desired "a greater level of delegation of address-related administrative functions" in ICANN 2.0, and wanted the ASO Council to assume "the responsibility for adoption of global policies and the recognition of new RIRs, and that

[265] In 2002, the ICANN Staff reported that "[b]ecause of the absence of legal agreement between ICANN and the RIRs, the RIRs have, over the past three years, been escrowing their scheduled contributions to the ICANN budget. As a gesture of good faith upon the staff agreement on the draft agreement, the RIRs released half of those escrowed funds to ICANN" (*ICANN Status Reports,* August 15, 2002).

ICANN act as a review body for such decisions" (see *ERC.* "Regional Internet Registries' Submission to the Committee on ICANN Evolution and Reform", June 20, 2002). The ICANN Staff was not prepared for such delegation of increased decision-making power to the RIR operators.[266] Consequently, these proposals were not incorporated into the successive ICANN mandate and structure document-drafts.

The RIRs' response to the disregarding of their concerns[267] was the creation of a common front under the name of a Number Resource Organization (NRO). In an "Open Letter to ICANN from the Regional Internet Registries" (see *Other Archives*. October 24, 2003), they justified the creation of the new organization with the need for a joint entity for coordinated actions in face of the potential risk of chaos in the Internet number space should a failure of such a private body as ICANN occur. They saw their role in ICANN mainly as guardians of both the unallocated number resource pool and the policy development process, so that "[t]he ICANN board will not be able to make any direct top down addressing policy" or "to veto a global policy proposal".

As for their contractual relations with ICANN, they designated the NRO to be "an interface for organizations outside of the RIRs". In effect, the new organization was designed to replace the ASO, but, more importantly, it was a manifestation of realized self-importance as key (only second-level below IANA) infrastructure providers in the Internet number space, which possessed certain bargaining power. On those grounds, the

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[266] In ICANN's view, the RIRs already had large decision-making authority, as "most aspects of IP addressing policy are established by the RIRs, which each have policy forums in which affected members of the Internet communities in their region can participate" (*ICANN Status Reports.* June 30, 2000).

[267] In an email exchange with the ICANN president Stuart Lynn, the three RIR operators stated: "The RIRs are dismayed with the second interim report of the ICANN E&R [Evolution and Reform] Committee in terms of the lack of consideration and response to the submissions of the RIRs to ICANN". They went further to criticize the way of resolving the ICANN reform crisis: "The process used by ICANN has been less open and more rigid, with little by way of feedback that would be typically associated with a dialogue" (*Other Archives.* "Email to Stuart Lynn", September 13, 2002).

already four RIRs[268] proposed an *Agreement between the RIRs (acting through the NRO) and ICANN concerning the ASO* to replace the MoU of October 1999. After months of negotiation, on March 30, 2004, ICANN signed a letter of intent, promising to conclude a Memorandum of Understanding between ICANN and the NRO by the end of May 2004 (see *ICANN Status Reports,* April 7, 2004).[269]

Second, the country-code TLD operators. By the time of its First Status Report (June 15, 1999), ICANN was developing guidelines for the accreditation of registries and had begun discussions with both registry administrators and its Governmental Advisory Committee (GAC) on "the appropriateness of, and standards for, contractual relationships with registries and registrars for ccTLDs (see *ICANN Status Reports,* June 15, 1999). Three years later, the 244 ccTLD registries were still keeping their autonomy and were fighting to enhance their voting power in ICANN by creating a separate supporting organization, instead of the existing constituency under the Domain Name Supporting Organization (DNSO) umbrella.

In many respects, the ccTLD operators shared the RIRs' mistrust of the new regime, as, for at least a decade, they had also enjoyed the informal coordination arrangements set up by Jon Postel (IANA), which had provided them with a great level of autonomy.

Populous, as it was, the ccTLD group was characterized by diverse experiences and interests. By and large, the ccTLD community consisted of two groups:

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[268] The Latin-American and Caribbean Internet Address Registry (LACNIC) was officially recognized by ICANN on October 31, 2002 (see BM 31 10 02).

[269] Nonetheless, ICANN concluded the negotiations with the RIRs only in September 2004, and the long-awaited revised ASO MoU was finalized only in October 2004 (see *ICANN Status Reports,* October 7, 2004).

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.[270] They preferred to work in the fairly liberal economic regimes of their respective countries rather than under the control of a U.S.-based private corporation. Those operators had the potential to participate (physically and online) in a very vocal manner in the ICANN process.

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 (it was expected that ICANN would attempt to impose uniform global policies on their practices), but 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.

Formalizing the relationships with the ccTLD operators was established by the DoC as an issue of utmost importance in the MoU with ICANN (1998). In fact, the global aspect of the Internet DNS governance encompassed three key stakeholder groups: the operators of the root servers, the RIRs, and the ccTLDs. Establishing contractual relations with the last element of this triad was the most difficult task. The national governments had gradually begun to think of the respective country-code domains as coinciding with the geographical territories, and developed aspirations to impose their legal authority on

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[270] The Council of European National Top-level Domain Registries (CENTR) was the leading coalition of around 30 members-ccTLD registries (in June 2000). It was formed in March 1998. Some of the most ferocious criticism of ICANN came from CENTR's members (see CENTR's website; http://www.centr.org/about.html).

the policy of delegation and redelegation of ccTLD assignments. Ultimately, establishing the ccTLD operators' status in ICANN provided the main entrance for the national governments to involve themselves in the new regulatory regime.

The Governmental Advisory Committee (GAC)[271] was quick to assemble, as early as May 1999, more than 30 representatives of national governments, multinational governmental organizations and treaty organizations. This coalition commanded that ICANN align its Bylaws with the GAC Membership definition as adopted in its Operating Principles.

In his testimony in front of the Congressional Subcommittee on Oversight and Investigations, Committee on Commerce, Prof. Jonathan Weinberg (August 24, 1999), a rather active participant in the ICANN working group process, pointed out this troublesome dynamic in the GAC: "The GAC's current organization... seems to me to violate ICANN's Bylaws... Under the formulation in the ICANN Bylaws, the GAC is a committee of individuals who represent national governments. Under the formulation in the GAC's own Operating Principles, the GAC is a full-fledged intergovernmental organization within ICANN... ICANN should seek to minimize the extent to which national governments formally participate in its processes *as sovereigns*, even without direct policymaking authority.... The GAC is problematic in part because it presents itself as an organization of sovereign governments, giving instructions to ICANN. If the GAC were downgraded to a committee of government representatives with expertise on

[271] According to the U.S. government's White Paper and ICANN Bylaws, national governments and intergovernmental organizations were allowed to participate in the collaborative process but only as observers and advisers. The GAC provided the platform for discussions and consolidating positions in closed meetings. It was constituted on March 2, 1999, and Paul Twomey, an Australian who later became ICANN's third President and CEO, was selected as its Chair.

Internet matters, it would more nearly accord with both the White Paper and ICANN's Bylaws".

Three years later, the above dynamics resulted in a GAC confident enough to state in its Bucharest Communiqué (June 26, 2002): "The GAC members agree that, at this stage, the GAC is the main forum for the international discussion of public policy issues that may arise in ICANN's sphere of competence, along with the competent international organizations (e.g. ITU, OECD, WIPO)" (*GAC Communiqués,* June 26, 2002). How far the GAC had deviated from its original format as an advisory committee in ICANN becomes clear from the fact that this statement was not supported by the governmental representatives of France and Germany, nor even by the ITU representative.

In the communiqués issued after every GAC meeting during the four years studied, the participating world governments[272] consistently built up the argument for their involvement, as a third party, in the ccTLD global policy development. The first step was to proclaim the Internet naming and addressing system a public resource, at the ICANN meeting in Berlin, May 1999. The ccTLD registries were said to operate "in trust", "for the public interest", and "on behalf of the relevant public authorities including governments, who ultimately have public policy authority over their ccTLDs" (see *GAC Communiqués,* May 25, 1999).

This statement was in sharp contrast to the established IANA practices for delegation of ccTLD assignments, based on the understanding that the operational responsibility of the ccTLD registries was to the local Internet community (see Postel,

[272] By October 2001, on the eve of the ICANN reform, the GAC still counted only 70 members, as only 30 of them were recognized as "active participants", which speaks of the limited representative authority of the group and the domination of countries with a high Internet-adoption rate in the GAC's position development (see *GAC Communiqués,* October 1, 2001).

1994). Nevertheless, the operators of these registries were more concerned with the new regime's attempt to formalize relations with them than with the national governments' aspirations towards the governance of the delegation and redelegation of ccTLD assignments.[273] What they wanted was to preserve the *status quo* of their relations with IANA, established since the late 1980s.[274]

Yet, it soon became clear that keeping the *status quo* was an impossible idea in view of the national governments' aspirations. On February 23, 2000, the GAC issued a fully developed policy framework for the management of the ccTLDs as a public resource (see *GAC Communiqués,* February 23, 2000). Although the document was designed to simply "suggest principles for development of best practice", it served to codify the national governments' policy authority over their respective virtual domains (the idea of governments maintaining "ultimate policy authority over their respective ccTLDs" was repeated several times in the document). In effect, the GAC members attempted to transform a (presumably) advisory document into an intergovernmental treaty. The possibility that a government or public authority would assume operational authority over a ccTLD registry was envisioned as well.

As a result, ICANN was "relieved" of its responsibility for conducting a selective delegation and redelegation process for ccTLD operators, which happily coincided with

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[273] In "A Personal Report from the ICANN Meeting in Berlin", Ant Brooks, the representative of the South Africa ccTLD - *.za*, noted that "the only group less popular than the ICANN Board itself at this week's gathering was the GAC". Yet, the dominating mood of the gathered 40 to 60 ccTLD representatives was "why is ICANN interfering with us at all?" Arguably, this had to do with the largely European representation at the ccTLD gathering (*Journalistic Articles,* Brooks, May 1999).

[274] In a draft document "Best Practices Guidelines for ccTLD Managers", issued by CENTR, this desire was confirmed by re-establishing the original principle that "a ccTLD authority comes from serving the local Internet community" (*Other Archives,* February 24, 2000). Several months later, the ccTLD constituency came up with a "Discussion Draft of ccTLD Manager – ICANN 'Status Quo' Agreement" aimed at reaffirming the then-existing designations.

the original technical elite's intention not to be involved in political controversies. ICANN was instructed by the GAC to delegate or reassign a delegation "in coordination with the relevant government or public authority" and only to a "delegee" that has been chosen by the relevant government.[275]

Gradually, the GAC emerged as a consolidated group of powerful stakeholders, which, apparently, intended to impose its leadership on the constitution of the ICANN/ccTLDs contractual relations, and, thus, to redefine the original advisory capacity assigned to the GAC in the ICANN Bylaws.[276] In respect to the ccTLD regulation, by limiting the scope of ICANN's responsibility to the technical maintenance of the ccTLDs' link to the root, the GAC was acting more as an informal international regulative body than as a consultative non-decision-making committee of approximately thirty active national-government representatives.

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[275] The new redelegation regime, as designed by the GAC, was imposed, in mid-2001, on the long-term *.au* administrator Robert Elz – an Internet pioneer in Australia. The Australian government requested reassigning of the management of the registry to *auDA* – the "industry self-regulatory body" endorsed by the government. Froomkin called this particular redelegation of a ccTLD administration "a watershed moment in ICANN's history", because "ICANN in effect simultaneously declared... that controversial dictates of the so-called ICANN Government Advisory Committee (GAC) will be treated as ICANN policy even if they have never been voted on by any other part of the ICANN machinery;... that it's ICANN/GAC policy to support the creation of national mini-ICANNs as an end-run around ordinary government procedures" (*Journalistic Articles,* Froomkin, September 5, 2001). *auDA* was, as well, the first ccTLD administrator to sign ICANN's new ccTLD Sponsorship Agreement.

[276] Commenting on the GAC's intensifying involvement in the ICANN policy-making, Mueller (November 10, 2001) observed that this would have "serious implications for the future direction of ICANN. It calls into question ICANN's status as a bottom-up, private-sector organization and points toward its gradual absorption by governments as an international regime under their direct control". Indeed, in September 2001, GAC requested that "the names of countries and distinct economies... should be reserved by the *.info* Registry in Latin characters in their official language(s) and in English and assigned to the corresponding governments and public authorities, at their request, for use. These names in other [non-roman] character sets should be reserved in the same way as soon as they become available" (see *GAC Communiqués*, September 9, 2001). The Board complied promptly with the GAC request, and just a day later, in a resolution, it authorized the *.info* registry *Afilias* to implement a freeze on any new registrations of ISO-3166-1 country codes under *.info*. Later the same year, the GAC members voted to intervene directly into the process of introducing new gTLDs. Mueller's conclusion was that "[i]t would seem that GAC has finally... stepped directly into the role of a 4th Supporting Organization; a Supporting Organization that seems to be 'more equal' than others, especially, the DNSO" (*Journalistic Articles,* Mueller, November 10, 2001).

Nevertheless, ICANN was content to have the GAC members mediate the difficult negotiations with the individual ccTLD operators.[277] Meanwhile, the power play among the three parties participating in the negotiations had intensified. In late 2000, the CENTR members, and Japan and New Zealand ccTLD operators, stated that they were thinking of moving away from ICANN's control (see *Journalistic Articles,* Magee, January 18, 2002). For its part, the GAC persistently targeted the grand design of "a three-party communications regime", which "should be the goal of relationships between ICANN and ccTLD administrators" (see *GAC Communiqués*, March 10, 2001). It considered the possibility of bilateral (legacy) agreements between ICANN and individual ccTLD operators as "provisional and interim in nature, pending appropriate expression by the relevant government or public authority for participation in a tri-partite regime".

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[277] 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 U.S. government to the corporation. Establishing contractual relations with the ccTLDs was the cornerstone condition for this in the MoU with the DoC. At the time, ICANN was aiming at more comprehensive agreements with the organizations operating ccTLDs. Aside from defining a ccTLD contribution to ICANN's funding, they were envisioned as contracts covering the delegation and redelegation issues, the allocation of global and local policy-formulation responsibility, and the relationship among the three parties: ccTLDs, national government, and ICANN (see *Status Reports*, June 2000). The draft-contract between a ccTLD and ICANN, developed by the CENTR, and presented at the Annual meeting of ICANN in mid-November 2000, though, was, significantly, only "a contract for services", and it did not touch on any policy authority issues. A ccTLD operator's financial contribution to the corporation was specifically defined as "a service fee" and not "a license fee" (see *Other Archives,* November 14, 2000). Being gladly accepted by the ICANN Staff and Board in its capacity of a broker in the "ongoing discussions", the GAC proceeded further to impose more binding conditions on the corporation. If ICANN wanted to "minimize" its liability for implementing a redelegation, it was urged to take "full account of the view of governments and public authorities" before acting on the proposed "Discussion Draft of ccTLD Manager - ICANN 'Status Quo" Agreement": "Any future contracts between ICANN and ccTLD administrators should reflect the administrator's commitment to be bound by the GAC Principles" (see *GAC Communiqués*, July 14, 2000).

The ICANN Staff[278], itself, decided to take advantage of the controversies in the inharmonious ccTLD operators group and resorted to a more sophisticated strategy. It began to target individual ccTLD administrators, who had exhibited less contempt towards a contractual arrangement within the new regime. A special Counsel for International Affairs and a ccTLD Liaison were hired to work with the senior Staff officers "to complete at least five agreements per month", as was optimistically indicated in the *Third Status Report to the DoC* (*ICANN Status Reports,* July 3, 2001). A year later, though, ICANN acknowledged that the progress in entering into agreements with individual ccTLDs had been slow – contractual agreements had been signed only with *.au* (Australia), *.jp* (Japan), *.bi* (Burundi), and *.mw* (Malawi) (see *ICANN Status Reports,* August 15, 2002). In the following year, ICANN succeeded in signing nine more agreements (see *ICANN Status Reports,* Jan. 8, 2003 and August 1, 2003).

ICANN correctly defined the cause for the total failure to satisfy the MoU condition and enter into contracts with the ccTLDs – it was the lack of "obvious motivation for ccTLDs to enter into any such agreements, absent compulsion from their local governments" (see *ICANN Status Reports,* August 15, 2002). Although the ccTLD constituency claimed that it was inclined to support the ICANN process, it had a number of grievances against the way in which ICANN Staff was treating it. It was strongly felt, for instance, that "the ccTLDs [had] little chance to have a representative elected to the ICANN Board", since it was only one of the seven DNSO constituencies, and the DNSO was allowed to have only three members on the Board. Yet, the ccTLD constituency

[278] ICANN began with only five Staff members, all U.S. citizens, selected, probably, in the same way as the directors of the Interim Board were – directly by Postel and Sims. Gradually, as explained later in the thesis, the number of Staff members tripled and their involvement in the policy-proposals preparation process increased significantly.

possessed considerable bargaining power in the ICANN process, as they were expected to contribute 35 percent of the overall ICANN budget for the first two fiscal years (around US$ 1.5 million per year) (see NCM 26 02 01).[279]

Overall, the ccTLD administrators looked with suspicion at ICANN's insistence on entering into contractual relations with them, and, by the Fall of 2001, a movement of major ccTLDs, namely, the European registries united in CENTR, had begun pressing ICANN to reform its representational structure and create a special ccTLD supporting organization.

The long-lasting and complex stand off between the ccTLDs and ICANN continued in 2002, when the corporation began its restructuring efforts. After four years of fruitless negotiations, though, ICANN was so desperate to achieve some progress that it began to use its IANA powers of both delegation and redelegation, and providing quality service[280] to ccTLDs as a lever to force them to get into contractual relationships.

The major European registries were persistent in their defiance of ICANN's policy authority over them, and, in early 2003, they found a powerful ally, namely, the International Telecommunications Union (ITU), to help them in the power play with the corporation. As the ITU's ambitions toward Internet governance were stimulated by the stalemate in the agreement-negotiations between ICANN and the ccTLDs, the World Summit on Information Society (WSIS) process was underway. The first major Internet

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[279] Nevertheless, at the time, only 98 of the 244 ccTLDs operating worldwide (or 40 percent) contributed to the ICANN process (see NCM 26 02 2001).

[280] The ICANN President and the Staff members attending the CENTR General Assembly (December 17 – 18, 2001) were presented with complaints from the administrators of *.uk, .de,* and *.fr* about IANA's failure to maintain the list of ccTLD data (see *Other Archives,* December 21, 2001).

governance event under this United Nations umbrella was an ITU workshop in Geneva dedicated specifically to the ccTLD issues (March 3 – 4, 2003).[281]

The ITU advertised the event as a neutral and non-confrontational venue to help settle differences. Indeed, for the first time, the ccTLD operators had the opportunity to comprehensively present their view that ICANN should be funded and overseen only by those dependent on its services, and only the immediate beneficiaries of that service should have the power to establish or change the operational procedures. In direct opposition to both ICANN's and the ITU's aspirations towards global policy making, an alternative to ICANN was proposed by Dr. Willie Black, the then-outgoing head of CENTR and the U.K. *Nominet*'s Executive Chairman[282] – "a body run jointly by CENTR and other regional ccTLDs", which would be less formally constituted than ICANN. All of the above suggestions were contained in an uncompromising position of denying the ICANN's policy authority over the ccTLDs: ICANN should organize only gTLD communities, for ccTLDs were answerable to their local Internet communities and they developed policy in that framework.

The ITU initiative, apparently, provided the ccTLD community with the opportunity to aggressively criticize ICANN at an international forum. Yet, arguably, for the ITU this was a viable opportunity to intervene in the regulative regime built by ICANN and the U.S. government, under the pretext of helping ICANN "to achieve the ccTLD-government consensus that appears to be missing today, by using ITU-T's well-

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[281] 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 http://www.nettime.org/Lists-Archives/nettime-l-0303/msg00027.html - see *Other Archives*. March 6, 2003).

[282] *Nominet UK* is the registry for *.uk* TLD, which manages the authoritative database of *.uk* domain name registrations (see *Nominet*'s website at http://www.nominet.org.uk/).

proven process and procedures".[283] The intention behind this "helping" gesture was very particular: the ITU would manage IANA in terms of defining policies and maintaining the IANA database which contained the ccTLD delegations, and, thus, would take over ICANN's relations with the ccTLD administrators. Ultimately, ICANN was seen as becoming a regular member of the ITU.[284]

The ccTLD community's strategy of seeking mighty allies was a success, for, at the ICANN Montreal meeting (June 2003), the foundation of a separate Supporting Organization in ICANN – the Country-Code Names Supporting Organization (ccNSO) – was 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.

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, and its political legitimacy as a private entity entrusted with the governance of a global public resource. By definition, ICANN was a voluntary consensus organization without statutory authority. Its power was derived from the level of Internet community consensus supporting its policies and procedures. That is why ICANN was required to work on gaining its public legitimacy (or, acceptance)

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[283] The ITU-T stays for the ITU Telecommunication Standardization Sector, which is one of the three sectors of the ITU. It produces standards (recommendations) covering all fields of telecommunications.

[284] To reply to this challenge, ICANN, under the leadership of the former GAC Chairman, Paul Twomey undertook considerable outreach efforts by opening new offices overseas. In its critical comment to the proposed 2005 budget, Network Solutions charged ICANN with attempting "to appear more international… at a time, when its authority and reliance on the DoC is being questioned by the UN" (NSI, May, 2004).

through setting up a multistakeholder representative structure and a bottom-up consensus decision-making process.

As will be discussed in Chapter 6, the implementation of the original organizational design, though, was compromised in ICANN's formative years by a number of factors, and the corporation gradually evolved as a trusteeship entity rather than a full-fledged multistakeholder collaboration.

Chapter 6. Implementing the multistakeholder consensus model, or fighting for structural power

At this stage of the development of the ICANN process
and the Internet itself, there are many persons and interests
jockeying for power, for control and for money.
Each interest has its own persuasive raison d'être,
and many, no doubt,
have influence in the halls of power of the United States.

Jonathan Cohen, President of the DNSO
Intellectual Property Constituency,
July 28, 1999

The present chapter is concerned with the power dynamics in setting a multistakeholder representative structure in ICANN and conducting a bottom-up consensus decision-making process. It should be noted that, from the beginning, there was a major problem with this task: the people who were entrusted with its realization either had no idea how to establish the White Paper's innovative institutional model[285], or subscribed, themselves, to the alternative trusteeship-corporation model. The former case

[285] In an interview for the independent online magazine of politics and culture *openDemocracy* (July 4, 2001), Esther Dyson, the Initial Chair of the ICANN Board, emphasized how advanced, in governmental terms, the idea of the new regime was, at the time, and linked that to one person's idealism, namely, Ira Magaziner: "ICANN was created at the behest of, but not by, Ira Magaziner, in the Clinton administration. He had a very enlightened attitude. He argued that running the internet and its infrastructure is not a job for the U.S. government, or any government. He concluded that it was a job for the internet community itself, and that it should create its own governance structure... [Without the Clinton Administration] it probably would not have happened. It was an odd example of idealism for both the free market and for the internet as a separate space. The Republicans, who are more [for the] free market, may not have had the imagination to do this... Ira had a peculiarly American idealism which run up against state authority on the one hand, and business with its tremendous powers on the other" (*Journalistic Articles. openDemocracy*, July 4, 2001).

applied to most of the appointed interim directors, who were novices to the Internet community and had not been exposed to its self-organizing efforts.[286] Contrarily, many ICANN participants had been involved in the open-participation consensus process of Internet standard creation within the IFWP, and, for them, this experience of cyberdemocracy provided *the* ultimate reference point for structure and process building within ICANN.

As for the second case, the fulltime Staff was devoted to the late Jon Postel's[287] view of a technocratic trustee entity in the name of protecting Internet stability by conducting speedy and efficient policymaking, in the public interest.

Whether unwillingly or deliberately, these two groups of power holders in the initial ICANN possessed the potential to undermine the implementation of the White Paper's (and the IFWP's) model of an innovative global-resource-management organization.

Under the specific circumstances of its inauguration, ICANN was required to fulfill irreconcilable expectations. On the one hand, there was the purely technocratic view of the management of the Internet DNS, which was focused exclusively on efficiency and effectiveness, and gravitated towards defining the ICANN mandate in technical terms: maintaining the stability of the Internet. The protagonists of this view tended to overlook the importance of the political process by which the medium's

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[286] As Weinberg (2000) points out, "[t]he board members, for the most part, had telecommunications and information technology backgrounds... Although some – most notably Esther Dyson and Jun Murai – were well-steeped in Internet culture, others were rather less deeply familiar with it and with the relevant technology" (43).

[287] Postel died on October 18, 1998 after a heart surgery. According to Mueller (2002), "[o]ne of the architects of the Internet's name and address spaces, and a man who commanded deep respect among the technical community, Postel had been the new corporation's most valuable asset. His death robbed the organization of its moral center, a good part of its institutional memory, and most of what remained of its legitimacy" (181).

architecture was shaped, and were not sincerely interested in the social implications of ICANN policy.

On the other hand, the champions of the bottom-up consensus view, who were all in opposition to the Interim Board and the Staff, asserted that ICANN's actions had public-policy content. In that view, openness and inclusion via user representation were as important principles of governance as effectiveness and efficiency. ICANN, they said, affected users in a myriad of ways, such as the potential use of IP addresses and domain names for identification or location of individuals and groups (privacy protection), the competition for and choice of the provision of services (consumer protection), domain name intellectual property issues (free-speech protection), and registration practices of gTLDs and ccTLDs. Conversely, it was considered as, simply, inappropriate to reduce ICANN's accountability to the public at large, which was often justified by considerations of what could be implemented and what the Board was likely to accept.

Polarized as these two visions were, they pointed to a common problem: the Corporation's mandate had received contradicting interpretations.[288] Yet, what made the ICANN process so difficult, in my view, was the shared inability both to understand the intrinsic challenges and requirements of bottom-up consensus building as an institutional

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[288] As it was stated in *Final Implementation Report* (*ERC* a, October 2, 2002) of the Committee on ICANN Evolution and Reform, "[o]ne recurring challenge for ICANN has been the unease of many that ICANN's scope was not framed by a clear and bounded mission. This unease has been one of the major reasons for the reluctance of some significant stakeholders to participate fully within ICANN, and has also led to calls for the elaborate processes that have made it extremely difficult for ICANN to be effective." The mission of ICANN is now articulated in Article I of the New Bylaws: "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN: 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are a. Domain names (forming a system referred to as "DNS"); b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and c. Protocol port and parameter numbers. 2. Coordinates the operation and evolution of the DNS root name server system. 3. Coordinates policy development reasonably and appropriately related to these technical functions" (see *ERC* b, October 2, 2002).

innovation, and to appreciate its potential to develop into a globally inclusive, and, thus, legitimate, decision-making approach.

In addition, being an overly-ambitious project in cybergovernance, ICANN began its mandate without three crucial pillars: 1/ a full-fledged organizational structure, 2/ a well-established bottom-up consensus process, and 3/ secured financing.[289] The IFWP process had left the impression of well-defined stakeholder interests and organizational formations, which could be easily transformed into structural units in the ICANN context. Armed with the White Paper guiding principles, the Board and the Staff proceeded to encourage the Internet community to begin the process of self-organizing in supporting organizations and constituencies.

6.1. Negotiating the balance of stakeholder perspectives: the representational structure

The ICANN model, according to the White Paper, Bylaws, and the Memorandum of Understanding (MoU) with the U.S. Department of Commerce, was based on a

[289] The investigation presented in the current section considers the matrix of techniques investigated by Weinberg (2000, 187), which "parallel the justifications historically offered to defend the legitimacy of the unelected federal administrative agency": 1/ "techniques of administrative law", used to structure ICANN so that "it looks like a classic U.S. administrative agency... bound by the tools of bureaucratic rationality"; 2/ "techniques of representation" consisting of "structures and procedures that make ICANN resemble a representative (that is to say, elective) government body", and 3/ "techniques of consensus" aimed at ensuring that, because of its structure and rules, ICANN "can only act in ways that reflect the consensus of the Internet community" (187-8). This matrix helps me structure and organize the enormous amount of data related to the organizational efforts in implementing the collaborative consensus model in ICANN. Thus, the present section contains analyses on 1/ building a representative structure; 2/ developing models of a consensus process, and 3/ struggling over funding dependencies.

fundamental architectural principle: to achieve a balance of perspectives by carving structural niches for a variety of stakeholders. [290]

The participation of two categories of global stakeholders, although in different capacities, was anticipated:

1/ professional/business entities as members of three supporting organizations, and

2/ individual Internet users as members of an at-large structure.

It was expected that the first category stakeholders would provide technical advice and "unbiased expertise", since the supporting organizations (SOs) were mandated to initiate new policy discussions, develop consensus, and come up with policy recommendations for the Board to approve. In practice, the SOs, which constituted ICANN's skeleton, were seen as forums, where the consensus-development process benefited from the fusion of diverse fields of expertise, while the decision-making process relied on the legitimizing power of the SOs' representation on the Board.

The At-large Membership's (ALM) role in ICANN was limited to electing Board members, as the Interim Board was forced to accept the idea of sharing power with an equal number of at-large directors (three representatives of the three SOs, and nine members elected by the ALM). Yet, during the formative stage, the concept of an ALM never reached a point of consensus, nor, ultimately, acceptance, although, in the official

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[290] Like a number of other ICANN critics, Weinberg (2000) muses over the question "what it means to 'represent' any community as ill-defined as the Internet community": "Unless we are to abandon all mechanisms other than one-person-one-vote, any mapping of votes to interests is to some degree arbitrary" (24). As is discussed later, equating consensus with voting was a common fault in ICANN, demonstrating the lack of consensus on what constituted consensus in a collaborative formation. On the other hand, some ICANN critics were not at all inclined to consider the corporation as a collaborative forum, but as classical industry regulative body (see Mueller, 2000; 2002).

ICANN documents, it was recognized as a means of fostering accountability and representation (see *ICANN Announcements,* November 2, 1998).

As subsidiary bodies authorized to develop policies in their respective areas of expertise, the three SOs (the Address Supporting Organization – ASO, the Protocol Supporting Organization – PSO, and the Domain Name Supporting Organization – DNSO) constituted the main venues for participation in the ICANN process.[291] Representing largely homogeneous and well-organized technical interests, the ASO and PSO sheltered a limited number of professional associations that, in turn, listed a significant number of members.

Structuring the Domain Name Supporting Organization (DNSO) membership presented a particular difficulty, as it was not clear how to provide the variety of stakeholder interests with a balanced participation in the policy-developing process (and, consequently, representation on the Names Council). As discussed below, the Interim Board's decision (March 1999) to approve the trademark holders/businesses interests' proposal for a particular DNSO constituency configuration, instead of allowing the General Assembly members to self-organize in an undefined number of constituencies, led to a permanent DNSO handicap: structural imbalances, which precluded an environment of consensus-aimed collaboration from emerging.[292] By controlling 18 of

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[291] As a policy statement, the White Paper only outlined the NewCo's structure, accentuating the principles of functional and regional representation on the Board (see U.S. DoC, 1998). According to Michael Roberts, it was Jon Postel who defined the three areas (IP number space, technical and engineering standards, and domain name space) "where some policy administration was needed" and mapped each of them on a supporting organization (interview with the author, February 20, 2002).

[292] There were seven constituencies represented in ICANN via the Domain Name Supporting Organization (DNSO): business users, Internet service providers, non-commercial domain name holders, country-code TLD registries, gTLD registries, registrars, and intellectual property owners. Although major Internet users, the national governments were deliberately excluded from the ICANN decision-making process. As members of the Governmental Advisory Committee they succeeded in redefining their role in ICANN, as is demonstrated elsewhere in the thesis. The resulting DNSO constituency structure was strongly criticized

the 21 seats on the Names Council, the industry/trademark/business constituencies were able, eventually, to circumvent undesired recommendations submitted by the working groups on substantive DNS policy issues, or even completely ignore the reports of the working groups and task forces on structural/organizational issues. As argued in the thesis, the ultimate result was the compromising of the working-group format of a consensus process and the tightening of the Names Council's control on the process of producing policy recommendations.

The Interim Board placed particular significance on urgently completing the ICANN structure building. Realizing the crucial importance of taking initiative at the stage of organizational-model implementation, the pre-ICANN rivals proposed competing structural and procedural designs for the SOs, at least, for the ASO and DNSO. The key dividing issues were who would be allowed to participate (open vs. closed membership), and what structural power a particular stakeholder would obtain via its participation in one or more structural units – SOs or DNSO constituencies.

6.1.1. The issues with the Address Supporting Organization

In the Address Supporting Organization's case, as the Internet address space had not yet acquired commercial value, the controversy over membership involved only a limited number of players. On the one hand, there were the three, at the time, Regional IP Registries (RIRs) that were responsible for executing the Internet address allocation

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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 *DNSO GA,* Alvestrand, August 30, 2000).

policies: assigning number blocks to large ISPs for further redistribution. As they were on the second level after the IANA of a hierarchical infrastructure, they envisioned a "closed membership" ASO, limited only to the existing and future RIRs.

On the other hand, the RIRs' non-inclusive approach to the ASO membership was strongly disputed by a group of telecom/trade organizations[293] on the grounds of not fulfilling the White Paper requirements of broad stakeholder representation.

While agreeing that any Internet address allocation policy had far-reaching and potentially quite dramatic business, technological and social implications, the RIRs claimed, though, that they, themselves, were umbrella membership organizations, representing a large number of ISPs.[294] Their main concern was not to "mindlessly replicate" the DNSO constituency structure, which could lead to "consequent tensions for control over Internet address allocation policy formulation between the two bodies [the ASO and DNSO]... since both groups would be asserting primacy of role due to their breadth and depth of constituency... We are not interested in proposals that place sectional interest before all others, as the resultant tensions are often irreconcilable" (*ASO,* August 12, 1999).

In effect, the above-presented dispute, which could be boiled down to enlarging a particular industry's membership participation in ICANN, and, consequently, its representation on the Board, addressed the fundamental structural principle in ICANN: establishing a balance of stakeholder perspectives via the organizational structure. The

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[293] Among the parties behind the application for an "open" membership ASO, submitted on February 5, 1999, to the ICANN Board, were: Commercial Internet eXchange Association, EuroISPA, CAIP, EcomLAC, the European Telecommunications Standards Institute (ETSI).

[294] Indeed, the RIRs were large-membership associations, as the following data, presented at the ICANN meeting in Berlin (May 1999) demonstrates: only the European RIR, RIPE NCC, which had been operating since 1992, had more than 1300 members, mostly ISPs, from 86 countries (see *Other Archives.* Karrenberg, May 1999).

ASO and PSO were venues for providing the perspective of the Internet technical and engineering cadre, while the DNSO encompassed the perspectives of both service-providing industries, and business and individual consumers.

As, at the time, ICANN was engaged in contract negotiations with the RIRs, and the DNSO had demonstrated the pitfalls of a complex constituency membership structure, the Interim Board decided to give the green light to the RIRs' proposal, and on October 18, 1999, the Address Supporting Organization (ASO) was recognized in a Memorandum of Understanding with ICANN.

6.1.2. The high stakes for representation in the Domain Name Supporting Organization (DNSO)

ICANN was a regulator born out of the crisis in assigning property rights in the Internet DNS. The corporation was expected to produce consensus policies on resolving trademark disputes and opening a competitive domain name registration market. The DNSO was the ICANN's consensus-developing vehicle in these policy areas; hence, the need for a full-fledged stakeholder representation mechanism, consisting of 1/ permanent units: constituencies, General Assembly, Names Council, and 2/ temporary units: working groups, task forces, and committees.

The DNSO structure was first outlined in the ICANN Bylaws. While not defining the organizational forms of stakeholder participation as "constituencies", the document enumerated registries, registrars, businesses, and end users as representatives of

"legitimate interests" to be involved in the DNSO policy-recommendation process (see *Milestone Documents,* November 21, 1998, "Article VI: Supporting Organizations").

It was then up to those holders of "legitimate interests" to initiate the process of self-organizing.

As was previously pointed out, the IFWP process was especially successful in consolidating differing interests on mutually-acceptable platforms. By discussing at length the issues of the NewCo's structural design and procedural parameters, the participating parties were able 1/ to comprehend what the stakes of the opponents were, and 2/ to come up with their own more coherent positions and arguments.

The first draft application for a DNSO was circulating online as early as September 23, 1998 - a month prior to ICANN's recognition by the DoC. The group that authored the application draft, and which would be later known as the Barcelona/Monterrey/Washington (BMW) Group, comprised mainly of those registrars, ISPs, international businesses, trademark owners, and high-tech organizations, which had participated in the gTLD-MoU attempt to privatize the Internet DNS management.[295] Arguably, the ten signatories to the BMW application represented the most consolidated stakeholder interests in ICANN: 1/ ISPs and domain-name registrars – including the European ISP Association (EuroISPA), which was the world largest association of ISPs, and CORE which alone listed 85 registrars in 23 countries; 2/ intellectual-property and trademark interests as represented by the International Trademark Association (INTA) with a membership of more than 3,200 corporations and firms in 117 countries, and the

[295] Referring to the gTLD-MoU period in the pre-ICANN DNS wars, the U.K. registrar Ivan Pope (*Netnames.com)* (*Other Archives,* December 23, 1998) commented: "It is obvious that the battle for control [over] the DNS has moved from ICANN to the DNSO… The same people, the same arguments, the same vested interests, and the same beneficiaries".

American Intellectual Property Law Association (AIPLA) with more that 10,000 attorneys as members; 3/ e-commerce businesses – Electronic Commerce Europe (ECE) representing thirty major European companies, and the International Chamber of Commerce (ICC) with over 7,000 member companies and associations from over 130 countries; and 4/ the Information Technology interests – the World Information Technology and Services Alliance (WITSA), and the Information Technology Association of America (ITAA) with 11,000 member companies.

That the negotiation process[296] was susceptible to power pressure, exerted by different stakeholders, becomes evident from the following online exchange between two active participants in the process (*Other Archives,* February 7, 1999):

- William Semich, operator of *.nu* registry (the South Pacific): "With the exception of a few private businesses with their own interests at the fore, and who have pushed for some of the elements that ended up in the Washington Draft, I haven't seen anyone successfully 'stacking the deck' in the DNSO process, at any of the drafting meetings, or at the meetings I attended in Barcelona or Monterey".

- Kent Crispin, the PAB Chair: "Who are you trying to fool? At both the Barcelona and Monterrey meetings [ccTLD] registry interests were the single largest constituency present, and there was a consistent thrust to stack things to favor registries... But such behavior has been a consistent pattern throughout... The registries, at least some of them, have been playing a consistent game of raw power politics throughout".

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[296] In only four months (from October 1998 to the end of January 1999), the BMW group convened three in-person meetings – in Barcelona, October 16 – 18, 1998, Monterrey, November 16 – 17, 1998, and Washington, January 22, 1999, where the participating parties negotiated their positions on the draft application.

Considering the previously discussed complicated contractual relationship of ICANN with the ccTLD operators (see Chapter 5.1.3), it can be assumed that, during the process conducted by the BMW group, the disputed issue was whether there should be a separate constituency for the ccTLD registries, in order for them to be directly represented on the DNSO Names Council. In the submitted application, nevertheless, a single constituency for the operators of gTLDs and ccTLDs was proposed.

Overpowered by the well-organized and consensus-bound stakeholders dominating the BMW group, by the end of December 1998, the representatives of the ccTLD and individual users' interests found another model for the DNSO to endorse. It was developed by the representatives of the Open Root Server Confederation (ORSC), the Association of Internet Professionals (AIP), and Network Solutions, Inc. – the so-called Paris Draft group. In contrast to the BMW application, which was preoccupied with the structural-power issue, the Paris Draft focused on the consensus process. Instead of pre-arranging the stakeholder interests in a particular number of constituencies, which, in practice, suggested the creation of adversarial groups in a constant battle for influencing the process[297], the latter model focused on an all-representative General Assembly (GA), where any group with the support of five percent of the GA members could claim constituency status. Seen as an open, consensus-based process-oriented rather than member-oriented assembly, the General Assembly would provide an

[297] Weinberg (2000) observed, for instance, that "[t]he constituency structure has also handicapped the Names Council by encouraging council members to think of themselves as representatives of their particular industries. This has made them more likely to hold on their constituencies' official bargaining positions and less likely to work together to develop good policy without the blinders imposed by those institutional identities" (21).

environment of collaboration among the constituencies, and not of power strategizing and irreconcilability.[298]

The discussions between the two drafting groups (February 1999) proved that it was impossible to "merg[e] some of the rationalities behind the choices".[299] As a result, at the ICANN Singapore meeting (March 2 – 4, 1999), the Board had to choose between these two applications, which demonstrated, once again, how deep the divisions among the stakeholders were, especially where strategic structural positions in the new organization were concerned.

The two rival groups were forced by ICANN to accept a compromise position on the DNSO as part of ICANN, with a GA open for participation to anyone with interest in the discussed issues and with the resources to participate.[300] The Names Council (NC) would act as a steering committee responsible for managing consensus and making recommendations to the Board. Although, in principle, constituencies would self-organize and self-fund, there would be seven initial constituencies, each electing three representatives to the NC.[301] The Board also split the "registries" category into separate

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[298] There were a number of mechanisms in the Draft designed to assure reaching of a true consensus: 1/ "calling for expert and diverse participation in production of reports"; 2/ "submitting reports to the General Assembly for comment and ratification"; 3/ "allowing any adversely impacted constituency to request fair hearing"; and 4/ "requiring that a full report of the policy research and development process" (including "minority" reports) "be forwarded to the ICANN Board for its review once the Names Council judges that general consensus has been achieved" (see *Other Archives,* February 5, 1999).

[299] See *Other Archives,* Abril I Abril, February 27, 1999.

[300] The "open" membership format of the DNSO General Assembly was intended for those individuals who could not find their proper place in the constituency grid. In practice, though, it prevented the General Assembly from assuming any particular function in the DNSO, except, as given by the Bylaws, to nominate the DNSO members of the ICANN Board, and to serve as a pool of volunteers, who would participate in research and drafting committees, and working groups chartered by the Names Council. The reason for such a weak General Assembly was that it was conceived as simply an open forum for discussing different issues, assuming the presence of an active At-large Membership in ICANN. That is why there was no provision in the Bylaws for the General Assembly to produce consensus on policy issues or possess certain decision-making power. Weinberg (2000) refers to the DNSO General Assembly as "a vestigial appendix" laboring "under the handicap of having no function and no authority" (20).

[301] Weinberg (2000) points out that "[t]he list of constituencies included in the Names Council reflects the political strength of the various actors at the time the institution was established". He further concludes that

constituencies for the gTLD registries and the ccTLD registries (see *Other Archives,* March 1999).[302]

Designing the DNSO provided 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. ICANN's early history is rife with similar cases, which has led participants and observers, alike, to conclude that achieving consensus in ICANN is an impossible task in view of the complicated diverse and uncompromising stakeholder interests.

Nonetheless, the above-presented instance of ICANN's early history challenges such a conclusion, as it demonstrates that, despite the significant differences between the approaches espoused by the rival groups, a mutually acceptable organizational framework was produced when the Staff assumed a broker's role and mediated the rigid positions on the basis of a third proposal. It was the case in ICANN that, paralyzed by distrust, the participating parties were unwilling to meet half way, or even to reconsider their ultimate goals.[303] Instead of being concerned with the provision of mediating

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"constituency formation process neatly illustrated the lessons of Mancur Olson's *The Logic of Collective Action* that is, it advantaged groups for whom the costs and benefits of domain name policies were concentrated at the expense of those for whom those costs and benefits were widely distributed" (21).

[302] Interestingly, under "other possible constituencies", three stakeholder groups on the user side were listed, which would never come into existence, though: 1/ public and academic information providers, 2/ the national domain name policy organizations, and 2/ individual domain name holders. Despite the omnipresent confusion in ICANN about the differences between the concepts of At-large Membership and an Individual Domain Name Holder Constituency, the need to strengthen users' participation in the DNSO was emphasized while still in the BMW Draft Application negotiations stage: "there really needs to be At-large representation at the DNSO level, because that is where the 'rubber meets the road' as far as policy development is concerned" (*Other Archives,* Crispin, November 13, 1998).

[303] The DNSO WG-C's incapability of reaching any consensus on the "new gTLD" policy provides an eloquent example of this trend in ICANN (see Chapter 4.3.2 for an investigation of the WG-C process). At the end of August 1999, the Names Council directed the WG-D ("DNSO Business Plan and Internal Procedures") to come up with interim measures to allow the Working Group C chairs to restructure the working group in a way that allows it to perform its functions. Despite the broadly shared view that the impasse in the group was due to the contentious issues discussed there, the need for mediation between, seemingly, irreconcilable positions was, for the first time, recognized in ICANN by Marilyn Cade as a way to conduct "a moderated discussion" leading to consensus (see *WG-D,* Cade, September 2, 1999).

service, the ICANN management, gradually, began to take over the policymaking task. This was done in the name of efficiency, and, as has been discussed previously, because of the time-pressure imposed by the DoC.

The intrinsic structural imbalances in the DNSO became evident in the process of implementing the constituency configuration, prior to and at the Berlin meeting (May 1999).[304]

1/ The highly-consolidated commercial interests were able to both rapidly self-organize in six of the overall seven constituencies and decide on their designees to the Names Council, for 18 of the 21 seats.[305]

In contrast, the non-commercial interests were not able to produce a consensus application, and the relevant constituency was recognized by the Board only at the Santiago meeting (August 1999).[306] For one thing, this was a heterogeneous-membership constituency, in need, itself, of further structuring. At least four separate interest groups participated in the constituency: 1/ professional societies and civil society organizations (such as the U.S. Association for Computing Machinery - ACM, the ISOC, Computer

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[304] The timeline of the constituency model implementation is presented in Appendix L.

[305] The Intellectual Property Constituency (IPC), in particular, provided an example of efficiency. Its first president, the Canadian lawyer Jonathan Cohen, who was the key figure in assembling the IPC's membership, testified: "At the meeting in Singapore, in 1999, the Board approved the DNSO structure... I went from this press conference straight to the Business Center at the hotel in Singapore and faxed or emailed all the leading intellectual property organizations in the world inviting them to the first meeting of the Intellectual Property Constituency in Toronto. A number of them came (probably, in March of 1999). I organized the second meeting in Wellington, New Zealand, [in April], and, a few weeks later, a further meeting in New York City. At that meeting, quite a few members, representing the major intellectual-property organizations in the world, including all trademark and copyright organizations, elected the first officers and members of the Names Council... and I was elected as the first president of the Intellectual Property Constituency, and also as a member of the Names Council... The guts of the constituency are made up of representatives from leading trademark and copyright organizations representing hundreds of thousands of practitioners and millions of clients" (interview with the author, March 25, 2002).

[306] According to the Non-commercial Constituency report to the DNSO General Assembly at the Los Angeles meeting (November 2, 1999), the constituency comprised 74 organizational members from all regions, and had active both mailing list and a web site (see *DNSO GA,* November 2, 1999). A year and a half later, in June 2001, there were 150 organizations listed in the Non-commercial Constituency.

Professionals for Social Responsibility – CPSR); 2/ civil liberties groups (ACLU and the Domain Name Rights Coalition); 3/ education and research networking organizations (the U.S. Educause and Renator in France); and 4/ some country code operators from developing countries, which were organized in national foundations or education and research networks.

To define the constituency's membership boundaries proved to be a contentious issue. It was exacerbated by the attempt of some members of other constituencies to join, or "invade" (Mueller), the non-commercial space. As a participant in the ICANN Berlin meeting, Mueller indicated that "from the beginning, the Non-commercial Constituency has been this very contested and disorganized domain, because it was really not a homogenous constituency, it really had no prior connections among the people involved, and some of them were hostile to each other and were more competing for control of it" (interview with the author, May 1, 2002).[307]

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[307] Mueller explained in more detail: "There was a conflict between two groups over the Charter of the constituency. That conflict led to the ICANN Board not recognizing the constituency until the Chile meeting... The group that was really in control of ICANN – people like Mike Roberts, and Joe Sims, and, sort of, "old boy" network of the Internet Society people.. [was] trying to lead the Non-commercial Constituency and be in control of it. Most of the real non-commercial and civil society participants were very upset about this, because the ISOC had made so many deals with the intellectual property interests that they did not view the ISOC as a legitimate representative of non-commercial interests... [W]hat really made us angry at that time was that, for the first Names Council election, the ISOC had proposed David Maher.... He is very much part of the ISOC – he's been on their Board of Trustees, or their policy adviser (something like that), but what was also significant was that he was a trademark lawyer, who had worked for IBM, and he took a position on the relationship between trademarks and domain names, which was, really, much more focused on protecting the trademark owners than protecting the freedom of expression. The idea that the Non-commercial Constituency would nominate a trademark lawyer to represent it on the Names Council just infuriated us. The Association for Computing Machinery (ACM) led by Kathy Kleiman and myself, and Barbara Simons, we tried to organize a Non-commercial Constituency. We came up with a different Charter and made clear that we would not favor electing David Maher to the Names Council. These two groups went to the Berlin meeting [May 1999]... and, of course, we had a fairly big conflict. We tried to compromise, but at that time, the ICANN Board viewed everyone who was a dissident, or who opposed them in any of their policies as being a tool of Network Solutions... [S]ince they were more interested in getting support from powerful business interests than from civil society groups, they were much more willing to listen to the ISOC. Although it was clear that the ACM group had more support among the civil society groups, they were unwilling to recognize the proposal, and the compromise

The contested non-commercial space in the DNSO was a scene of other dynamics, as well. As the commercial constituencies experienced difficulties in satisfying the Bylaws requirement of geographic diversity[308] for their designees to the Names Council[309], the Non-commercial Constituency was perceived as the entrance point to ICANN by a number of geographically dispersed stakeholders.

Although the need for a constituency representing the consumer interests of the millions of individual domain name holders (IDNHC) was recognized during the DNSO-development process, this project could not gain favorable treatment in ICANN.[310]

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proposal, that was put forward by ACM at that meeting, and we were really in a very messy process..." (interview with the author, May 1, 2002).

[308] Although the ICANN Bylaws did not provide a specific requirement for geographic diversity on the DNSO Names Council, it was largely accepted by the participants, and the Management alike, that, by association, the requirement for the Board composition applied there, as well: "Section 6. INTERNATIONAL REPRESENTATION: In order to ensure broad international representation on the Board: (1) at least one citizen of a country located in each of the geographic regions listed in this Section 6 shall serve on the Board (other than the Initial Board) at all times; (2) no more than one-half (1/2) of the total number of At Large Directors serving at any given time shall be citizens of countries located in any one Geographic Region, and (3) no more than one-half (1/2) of the total number of Directors, in the aggregate, elected after nomination by the Supporting Organizations shall be citizens of countries located in any one Geographic Region. As used herein, each of the following shall be a 'Geographic Region': Europe; Asia/Australia/Pacific; Latin America/Caribbean Islands; Africa; North America." (*Milestone Documents,* November 21, 1998). In response to the many objections, though, raised while the DNSO proposal was discussed in March 1999, the Interim Board decided not to impose a specific requirement that no two directors selected by any Supporting Organization be citizens of any one geographic region.

[309] As a representative of the Asia-Pacific TLD registries, the South-Korean Youn Jung Park, for instance, was "shocked" to see only representatives from the U.S. and Europe, and no one from Asia-Pacific, on the Names Council: "This was very shocking to the Asian community, because... there was a lot of impressive statistics about the Internet areas [from that region], and we sort of felt that it was our right to be represented in this process... That's why we tried to have Asian representatives on the table, and we realized that the only chance could be the unrecognized Non-commercial Constituency. So, what I did was... a kind of outreach in several countries, starting with Malaysia. I gave some presentations about what ICANN is and what Internet governance is. By doing that, we could mobilize... non-commercial organizations in this region, and what was very impressive at that time was that this was the most numerous [group] in the non-commercial mobilization process. Later, people asked me to stand as a candidate for this [Names Council] election" (interview with the author, May 3, 2002).

[310] After the Singapore meeting (March 1999), Joop Teernstra, a ccTLD operator, asked ICANN three times to recognize an Individual Domain Name Holder Constituency (IDNHC), and in Berlin (May 27, 1999) the Board decided "to defer consideration of the proposal until a later date". The stated reason was the previous decision not to consider applications for additional constituencies until the original constituencies that had been established in Singapore (March 1999) were constituted. The decision was influenced, as well, by the unresolved, at the time, issue with the structure and operation of the At-large Membership (see BM, 27 05 99). Ultimately, the Board completely ignored the proposal for an IDNHC, despite both the DNSO General Assembly's support voted in Santiago (August, 1999), and the fact that the

Overall, the implementation of the DNSO structure, as a power-laden exercise, was perceived by the non-commercial participants as "a farce", "a completely unjust arrangement, which... [has] artificially strengthened the interests of some of the businesses, particularly the intellectual property people" (Mueller, interview with the author, May 1, 2002).[311]

2/ Reflecting the peculiarity of the pre-competitive-registry-market era in ICANN, the Registries Constituency consisted of a sole member – Network Solutions, Inc. Yet, according to the Bylaws, this constituency was entitled to three seats on the Names Council. After an unsuccessful attempt to redefine the membership qualifications for the constituency[312], NSI decided to take advantage of the paradoxical (although, clearly, temporary) situation, and designated two of its lawyers and one employee to become

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attempt to self-organize such a constituency had resulted, by July 2000, in a potential membership of 182 domain-name holders (see *DNSO GA,* July 14, 2000). Neither did the DNSO Names Council implement the DNSO Review Task Force's recommendation "to establish a study to identify specific core issues that need to be addressed in order to determine if and how to establish and individual domain-name holder's constituency" (*WG-Review,* February 17, 2001). Any further attempt to urge the Names Council to create a working group or a task force on the IDNHC issue, made via the General Assembly or the Interim Review Group, was met with inertia, apparently aimed at preserving the status quo of the structural power distribution on the Names Council.

[311] In his testimony at the Congressional Hearing - Subcommittee on Oversight and Investigations, Committee of Commerce, on August 24, 1999, Weinberg emphasized that the real problem of capture in ICANN appears in connection with the DNSO Names Council: "The Names Council's structure is problematic and highly disturbing... Currently... more than a third of the Names Council's members are representatives of trademark and business interest... On issues where other Names Council members do not feel strong interests, this can easily be enough to control the vote. Indeed, it is arguable that the current Names Council has a built-in majority inhospitable to gTLD expansion – six business and trademark representatives, who oppose the addition of new gTLDs..., and three country code top-level domain representatives, who may see any new gTLDs as undesirable competition for their own registries... The larger problem is that the Names Council's constituency structure is incoherent. It gives specified interest groups decision-making power that is wholly unrelated to the groups' importance. Or support, in the Internet community as a whole... there is no reason to think that it will generate either representative decision-making or good policy".

[312] In April 1999, the NSI proposal to redefine the TLD registry categories as being "closed" vs. "open" (instead of the existing gTLDs and ccTLDs) stirred online controversy (see, for instance, Mueller, April 15, 1999). It reflected the practice of a number of ccTLD registries to be operated as commercial enterprises, and allow out-of-the-territory domain name registrations (some of them were *.ch, .uk, .nz, .dk, .nu*). Nevertheless, the timing of the proposal – in the midst of the DNSO formation – raised the suspicion of a hidden agenda on NSI's side. As the proposal was rejected by the Board, it can only be speculated that NSI was attempting to fill up the hollow Registry Constituency shell with some membership, and, thus, substantiate future claims of reached consensus positions.

Names Council members. The gesture of the hated-by-all monopolist was firmly rejected by ICANN. After a series of letters between ICANN and NSI, the registry was presented with an ultimatum: that it respect the "near-unanimous sentiment" at the Berlin meeting that "no one company should have that level of influence in a body that is designed to be broadly representative", or ICANN would propose an amendment to its Bylaws for public comment stating that "no one company should be able to place more than one representative on the Names Council" (*ICANN Correspondence,* Roberts, July 9, 1999).[313]

6.1.3. Geographical diversity as a representational dimension

Along with achieving functional diversity of representation via supporting organizations and constituencies, ICANN's structure aimed at geographical diversity. This second dimension of the fundamental structural principle in ICANN – establishing a balance of stakeholder perspectives, was formally presented as a series of ratio requirements for the composition of the Board and the SO councils. Thus, according to the Bylaws, appropriate representation meant at least one director from each of the five recognized regions and no more than the half of the board members from any one region. At the same time, only three At-large directors from any region were allowed on the Board. The Bylaws prevented, as well, any DNSO constituency from electing two of its three Names Council members from the same geographical region.

[313] On August 12, 1999 the Board adopted the above-mentioned amendment to the ICANN Bylaws, thus preventing NSI from controlling more than one vote on the Names Council (see BM 12 08 99).

Geographical diversity was a political issue as, at least in theory, the national governments were only observers of and advisors to the ICANN process. It was no secret that the corporation was perceived by the non-American participants as an instrument of the U.S. domination over the Internet.[314] The geographical diversity leadership ratio was a mechanism for establishing ICANN as a globally representative body. Arguably, ICANN needed a special strategy in order to attract participants from every corner of the world and make the new regime legitimate and accepted.

To bridge the gap in geographical diversity and representation in ICANN, the DNSO Names Council created a working group on global awareness and outreach – WG-E, as one of its initial five working groups.

Compared to the working groups with more than a hundred regular participants, the WG-E was a small group, which could not achieve a clearly detectable consensus.[315] The group's Final Report explained that this resulted from the low level of interest generated by the discussed issues, and the lack of an established definition of consensus in ICANN. Indeed, as the further analysis suggests, in the initial years, the U.S. and European participants' dominance in ICANN was, partially, expressed by intense participation in the working groups, which discussed either substantive Internet DNS

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[314] In response to the question "how is ICANN perceived by the non-North-American participants", Mueller referred to the Non-commercial Constituency's experience, because "the Non-commercial Constituency has more participation from developing countries than any other. They [the participants] pretty much view it [ICANN] as an arena that is dominated by the United States and by big Western business interests, and they simply want to have a seat at the table. They are more concerned about just being there and having a voice than they are about anything else. They are very concerned about language and the fact that everything is done in English. They will typically vote for people on regional or geographic basis, sometimes, in a very frustrating and self-defeating way. For example, they might elect somebody to the Names Council because he is from Africa, but, then, this person will never show up, because he lacks the time or the resources to fully participate in meetings that might take place around the world" (interview with the author, May 1, 2002).

[315] The WG-E, which needed a full year (from June 1999 to July 2000) to come up with recommendations, comprised 40 members on the list serve. Most active were the participants from North America (17 people) and Asia-Pacific (11), while Africa and Latin America were represented by only a few people each (see *WG-E,* July 4, 2000).

management issues (i.e. the UDRP, new gTLDs, and famous trademarks), or internal-governance issues (i.e. structural power, representation ratios, type of membership). Arguably, geographical diversity, although accepted as a constitutional principle in ICANN, was not considered by the dominating interests as an essential policy issue for the corporation. The (not so) "silent" presence of the world governments in ICANN via the GAC was perceived as a mechanism compensating for the lack of proportion in participation from the developing countries.

Yet, ICANN badly needed more non-Anglophone participants in the first year, because of the U.S. government's requirement for assembling a globally-representative At-large Membership to elect nine directors on the Board by September 2000. By July 2000, there were already over 20,000 at-large members listed in ICANN[316], yet "[a] very high percentage of these members [we]re from the developed countries, in particular from U.S.A. and Germany" (see *WG-E,* July 4, 2000); hence, the WG-E recommendation for outreach activities in regions "where ICANN involvement is minimal such as Central and South Asia, the Middle East and central parts of Africa".[317]

The WG-E outlined a wide variety of information tools to be developed for those who could afford to travel to the quarterly ICANN-meeting destinations, and those who could not do this. For the former group, newcomer orientation sessions and workshops,

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[316] See *ICANN Status Reports,* June 30, 2000. In September 2000, there were 76,183 activated members in the ALM (see *Other Archives.* September 8, 2000). Ultimately, 34,035 Internet users around the world voted in the at-large directors elections in October 2000 (see *Other Archives*. October 11, 2000).

[317] As an important incentive for ongoing involvement of participants from these regions in the ICANN process, along with "being able to vote once a year" in Board elections, the WG-E considered the participation in "the time consuming DNSO working group process". In an early preview of the coming elimination of the open deliberation working groups in ICANN, they warned: "The sense based on recent DNSO Names Council actions is that the working groups may be ignored at whim. This attitude is not conducive to the type of grassroots and international involvement being sought within the working group process" (*WG-E*. July 4, 2000).

including programs offered in the local language, were suggested. To reach the broader pool of potential ICANN participants, information materials addressing the particular needs of different audiences and translated into different languages[318] were envisioned.

As transparency was a built-in principle in ICANN[319], the corporation's activities were conducted at a level of openness unprecedented for a private organization.[320]

The cultural dominance of the U.S. and European representatives in the ICANN process, though, was diminishing the effectiveness of the used techniques of transparency and openness, where global outreach and awareness were concerned. The exclusive use of the English language was the most significant obstacle for active participation in online and face-to-face discussions.[321]

Thus, although the ccTLD Constituency consisted exclusively of professionals with a very good command of English, the dominant culture of deliberating often prevented them from articulating their positions. As Oscar Robles-Garay, the Mexican TLD registry (*.mx*) representative and a member of the DNSO Names Council for the ccTLD Constituency, explained: "For the non-English speaking people of Asia-Pacific, it is not their culture of taking the microphone and speaking out against someone's

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[318] It was recommended to translate information materials into all popular languages, which are spoken by four percent of the world population, such as Arabic, Chinese, French, Hindu, Russian, and Spanish. Still in July 2000, the ALM pages were translated in seven languages.

[319] See *Milestone Documents,* "Bylaws", July 16, 2000, Art. III: "The Corporation and its subordinate entities shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness".

[320] In his review of ICANN's legitimizing techniques, Weinberg (2000) describes the "notice-and-comment" technique implemented in ICANN: "It [ICANN] has made proposed policy documents available for public comment; it has held itself open to receive those comments for a specified time periods; it has allowed commentators to see, and reply to, the public comments filed by others; and it has sometimes, though by no means always, referred to those comments in documents accompanying the resulting policy announcements" (16). In addition, webcasting in real time has been secured for each of ICANN's quarterly meetings around the world.

[321] The WG-E Chair, the South-Korean Kilnam Chon, for instance, observed: "If you see any ICANN meeting, you will find almost all speakers are native English speakers even though there may be more non-native English speakers in the meeting. Procedures carried out at ICANN tend to be of USA and of the western civilization" (Chon, June 10, 1999).

argument, and for many of the English [speaking] people, it's a common issue. For the Latin-American people, it's very difficult to deal with English language... So, this is a big barrier for the rest of the group. From the 60 ccTLD people at a meeting, you'll see only ten speaking, and the rest of us will be just listening" (interview with the author, May 23, 2002).

With the WG-E recommendations, the consensus-based process in ICANN came to an end, as, in mid-2000, the open-working-group format was completely abandoned. Moreover, as happened with some of the other working-group reports, these recommendations were ignored by the Names Council and the Board.[322] The attitude of the power holders in the corporation towards any outreach programs at the time was consistent with the view of a top-down trusteeship organization.[323]

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 global e-election of five at-large directors. The tensions accumulated along the way, nevertheless, threatened to eradicate ICANN as a global private self-regulation initiative, unless it provided satisfactory alternatives to both the detected lack of accountability and transparency, and

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[322] Only after the reform were some of the WG-E recommendations implemented. Thus, at its meeting on January 15, 2004 the Board decided to open the first ICANN branch-office of a non-profit nature in Belgium (see BM 15 01 04). In addition, along with the creation of a network of Regional At-large Organizations (RALOs), the translation of information-materials into a number of languages was undertaken.

[323] As Michael Roberts, the first ICANN President and CEO, argued, "[s]ome people have felt that ICANN ought to be like the United Nations, and identify some languages, and have everything translated. Directors feel very strongly that what that does is a sort of neo-colonial. The worldwide language of the Internet technology and Internet services is English and all the people that are in this business don't have any trouble communicating in English. On the other hand, the use of English among the users across the globe is maybe 30 percent of the total... I'm a sort of an opponent; I feel very strongly that everybody on the planet ought to have English as a working language, because it is such an efficiency improver. Efficiency in economic and technical affairs is very important to human society, and I think that we ought to quit arguing about it and all have English" (interview with the author, February 20, 2002).

the unbalanced representative structure. As a result, in 2001, more and more participants began to insist on reforming ICANN, although for different reasons and with differing aspirations.

6.2. Designing the consensus process: from bottom-up to top-down decision making

Working collaboratively towards producing consensus policies on substantive issues constituted ICANN's *raison d'être.* Yet, ICANN was required by the U.S. DoC to produce consensus policies without an established process model to guide the participants in issue formulation, discussion groups formation, effective leadership, staging the discussions, recognizing points of consensus, and producing consensus recommendations to the Board. The Bylaws did not provide clear guidance, as well, on the division of responsibilities among the structural levels in ICANN: consensus-producing units (working groups and task forces), the DNSO Names Council, and the Board.

Moreover, ICANN did not have an operational definition of consensus, based on a set of clear-cut criteria. For those stakeholders who were familiar with the IETF's online standard-setting process, producing legitimate policies in the Internet DNS administrating area meant reaching "rough consensus". Fearing the structural power of the established technical and commercial interests, those, who claimed to represent the individual user's perspective, insisted on a more parliamentarian-like system of recognizing consensus, yet, ultimately, voting on each "consensus" point.[324]

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[324] In one of the rare instances where an ICANN official would elaborate on the applied notion of consensus, Esther Dyson developed the following argument: "It is useful to define what we mean when we use the word 'consensus'... what it does mean is that, on any particular issue, proposed policies are generated from public input and published to the world at large, comments are received and publicly

In a nutshell, crafting a consensus process model in ICANN was perceived by those, who had lost the battle for proportional representation on the decision-making level, as the last ditch in the war over the regulative regime of the Internet DNS as a common pool resource.

6.2.1. Discrediting the working-group consensus model

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) by the newly formed DNSO Names Council to produce consensus recommendations in the main policy areas of the ICANN mandate.[325] The scope of the issue areas and the manner in which the working groups self-organized reflected the "good intention" of ICANN to build a bottom up consensus mechanism and answer the most pressing needs of the Internet community for policies. Yet, because this was conducted hastily and amateurishly, the results of the prolonged discussions in these working groups were, largely, disappointing. Aside from the fact that the participants were able to agree only on

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discussed, and an attempt is made, from the entirety of that process, to articulate the consensus position as best it can be perceived...Unfortunately, there is no litmus test that can objectively render a judgment as to whether this standard has been met in any particular situation. Perhaps the best test is whether the community at large is comfortable with the process and the results, and the best gauge of that is probably the level of continuing participation in the process, and voluntary compliance with the policies produced by that process. This is, necessarily, a more ambiguous standard than counting votes or some other objectively measurable criteria, and it inevitably means less efficient, more messy, less linear movement, as the perceived community consensus shifts and adapts to change, or as perceptions of that consensus themselves are refined or change...Still, it appears that the process has actually worked remarkably well considering the difficulty of the task, as measured by the fact that most of the global Internet communities continue to participate in this consensus development process" (*ICANN Correspondence,* Dyson, July 8, 1999).

[325] The created 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.

some very general propositions, the model of global stakeholder collaboration, that ICANN exemplified, was discredited. It gradually became a broadly shared view among the participants that ICANN was unable to reach consensus because of the property-rights issues it was tackling, and because of the irreconcilable stakeholder positions. Such a view was welcomed by the "top-down" and high-efficiency policy-making champions, and, ultimately, it provided the main argument in 2002 for initiating a reform process. In effect, with the Reform, it was accepted that a purely private self-regulating regime, without the involvement of national governments and international treaty organizations, was unsustainable.

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 preliminary conditions.

First and foremost, the manner in which the process of consensus-building was to be conducted was yet to be discussed, when the working groups on substantive policy issues were convened by the DNSO Names Council. In fact, one of the five working groups, WG-D, was chartered to produce recommendations on the DNSO business plan and internal procedures, as the ICANN Bylaws contained nothing more than the requirement of "fair and open processes". Yet, ironically, WG-D was one of the last to submit its final report to the Names Council (see *WG-D,* Fausett, January 31, 2001). What this meant was that the mainly online discussions in the working groups lacked uniform procedural rules, and tools for consensus-reaching (such as mediating opposing interests, or moving the discussions ahead by compromise proposals, etc.).

Second, the DNSO stakeholder constituency structure was still evolving, when the working groups' online debates began. As shown further, the best entrenched interests were able to jump into the discussions quickly, and, thus, influence the agenda, and even define the terms and aims of the discussions.[326] This prevented, for instance, the Non-commercial Constituency, which was recognized by the Board only in August 1999, from building strategies of participation in the working group process.

Third, the implementation of such an innovative governance model as the one outlined by the White Paper required a high level of professionalism. Instead, the task of establishing a "bottom-up" process was left to the collective amateur efforts of the most active participants, without considering the existing examples of multistakeholder consensus formation on the global level or consulting with experts in Organizational Studies. It was the WG-D's experience, for instance, to swing back and forth between adopting Robert's Rules of Order for voting in a working group or implementing the well-established "rough consensus" process of the IETF. While struggling for a compromise, the WG-D observed the disintegration of the processes in the other working groups, which influenced its analysis and recommendations for the working-group model.

At the same time, as already noted in this thesis, there were some successful collaborative policy-making formations on the global level, especially in the environment-protection area, and those would have provided a stable reference basis for

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[326] The following excerpt from a comment by a WG-D participant exemplifies the dominating critical attitude regarding the possibility of consensus-reaching in ICANN: "Here we go again with the political culture clash. Lobbyists don't do consensus, in any of its forms. Any lobbyist who gives up a position for the 'good of the whole group' will soon be out of a job...True consensus can only occur when a participant's loyalty is to the group *as a whole*, not to a constituency. The participant *must* be willing to sacrifice a self interested position to make consensus work.. I doubt very much whether anything even remotely approaching a true consensus process will occur in ICANN. A better description of ICANN is self regulation implemented by traditional industry lobbying organizations" (*WG-D.* Schutt, April 20, 2000).

ICANN for overcoming the most rigid stakeholder positions and reaching true consensus on contentions issues.[327]

As a result of the WG-D's efforts, a number of consensus recommendations, which outlined an open bottom-up working-group-based process, were reached and included in its Final Report (see *WG-D,* Fausett, January 31, 2001): 1/ working groups should be "open to all who wish to participate", giving, nevertheless, "the chair discretion to maintain order" in the online discussions; 2/ "any member of the DNSO could begin the process for creation of a working group", but it is the Names Council that approves the establishment of a working group; 3/ because rigid, formalized procedures (such as Roberts Rules of Order) are considered not productive for an online working group, the chair should be allowed to select a manner of conducting the discussions, which leads to producing consensus; and 4/ a working group's consensus recommendations should be "well-documented and specific", in order to be used in producing policies binding the entire Internet community.[328]

By the time of the report, though, the working-group model had been greatly discredited in ICANN, because of two interrelated dynamics noticed before. On the one hand, the three working groups on DNS substantive issues (WG-A on the UDRP; WG-B on Famous Trademarks; and WG-C on New gTLDs), despite attracting considerable online participation for a number of months, reached consensus only on very general issues. On the other hand, the Names Council largely ignored the working groups'

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[327] It was only in June 2001 that the Names Council decided to form a task force to review consensus models used elsewhere and outline practical definition of consensus for the purposes of Names Council's consultation activities (see NCM, June 2, 2001).

[328] The case in point here was Network Solutions, Inc., which, according to the MoU with the DoC and ICANN was obliged to follow ICANN's policies only if they reflected the Internet community consensus.

recommendations as not representing community consensus[329], which was interpreted by the participants as a demonstration of structural power by the trademark-business interests, dominating the Names Council composition.

A year later, when the WG-D finally submitted its report to the Names Council, the working-group model had already lost its relevance to the DNSO process, and the Names Council had decided to substitute the "closed" task-force format for them, as a consensus-producing mechanism.[330] Accordingly, the Names Council forwarded the WG-D Report (along with the reports of the WG-E – "Global Awareness and Outreach", and the "DNSO Review" Task Force) to the newly formed Review Interim Committee[331], and, thus, as it was predicted by the WG-E on Global Awareness and Outreach, discouraged broad open participation in ICANN's process by its disregard of the collaborative community efforts.

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[329] The following excerpt from the Names Council meeting minutes illustrates the prevailing attitude among the Names Council members towards the working-group model at the time: "Some members of the Names Council felt that whereas the role of the WGs is to gather public opinions and thoughts, the NC members should discuss among themselves, then combine both, and later deliver to the Board.. The role of the NC is to ensure they represent the NC stakeholders, and provide recommendations based on it. Sometimes working groups are dominated by large talkers, not representing point of view of the constituencies" (NCM, April 18, 2000).

[330] In a desperate attempt to protect the working-group format from being completely discarded, Fausett , the WG-D Chair, posted an open letter to the Names Council with the following plea: "Working groups are *extremely effective* at identifying the universe of issues that need to be considered on a given problem and developing tentative recommendations about how to address those issues... One of the primary goals of the ICANN consensus policy-making process is to bind a recalcitrant participant to a consensus policy on which it does not agree... The Working Group process potentially provides one of the best mechanisms for meeting the consensus requirements in many of the ICANN contracts... I hope that the NC will not abandon the open Working Group format..." (*WG-D.* Fausett, April 9, 2001).

[331] See NCM 10 04 01.

6.2.2. Two consensus models in competition: working groups vs. task forces

Prior to the 2002 Reform, ICANN undertook one more attempt to remedy its structural imbalances, which were constantly generating controversy and "hammering" its image as a global private-sector alternative to international organizations. At the DNSO Names Council meeting at Yokohama, on July 14, 2000, the Board announced a new initiative to comprehensively review the functioning of each of the SOs. The DNSO Names Council was quick to accept the idea to experiment with two recommendation-generating formats, working in parallel - a working group, for public comments, and a task force, consisting of Names Council members – with one representative from each constituency. The Task Force was mandated to "receive the results of the working group, take comments from constituencies, and undertake an evaluation of the DNSO's performance since its inception, reporting back to the Names Council no later than October 1 [2000]" (see NCM 14 07 00).

Allowing the two formats to coexist – moreover, to execute identical projects – was a decision laden with significance. It was recognition of the Names Council's intention to move away from the noisy and controversial discussions in working groups, and to embrace the easy-to-manage exchange of messages in a task force format. Apparently, it was assumed that, first, the inevitable loss of broad consensus-generating on particular discussion points in a working group would be compensated for by the public comment on a task force draft report, and, second, that stacking the task forces with constituency-selected Names Council members could guarantee the credibility of the proposed recommendations.

For the opponents of such a view, the Names Council's decision on DNSO review provided an opportunity for the two formats to compete, and, ultimately, to divert the Names Council from discarding working groups altogether. In mid-2000, ICANN was still trying to comply with the U.S. government's designed global stakeholder representation and consensus decision-making model, because of the expectation of the promised complete transfer of the management of the Internet root by the end of September 2000 (see MoU with the DoC). Nevertheless, 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 in the Internet DNS, and it was irrelevant for them how this would impact the individual user's rights of privacy, security, and free-speech online.

The manner in which the Names Council's plan was executed, though, suggests that most of the Names Council members were not comfortable with the idea of the Board reconsidering the DNSO structure and procedures. For one thing, while a DNSO Review Task Force was assembled by representatives of the constituencies on the Names Council in July 2000, a WG Review was established only six months later (December 19, 2000).[332] The prerogatives of the working group, though, were severely limited (see NCM, 19 12 00). Aside from the fact that it had to present its report to the Task Force by January 15, 2001, its mandate was only to generate public response to the Review Task Force questionnaire. Meanwhile, Park, the WG Review Chair, insisted on allowing the

[332] In the interview with Park, who consequently became the WG Review chair, she explained: "After implementing the working groups, they [the Names Council members] faced many noisy people whom they didn't want to deal with, so after these five working groups, they tried to shut up the working groups. There was a lot of demand to recognize new working groups that were going to work on DNSO Review, but they were not approved by the Names Council" (interview with the author, May 3, 2002).

working group to review the DNSO's responsibilities and performance, and to develop recommendations for making the DNSO work as designed.

Despite the above limitations, the online response to the WG Review invitation for discussion exceeded all expectation.[333]

The parallel-track review process resulted in documents, which differed in their scope and depth. Thus, the WG's recommendations were based on a summary of the views of a large number of individual participants. The Review Task Force (TF), for its part, relied on the collective contributions of the DNSO constituencies, the General Assembly, and the submissions of several individuals. Thus, in the competition between the two consensus-building formats, it transpired that, in ICANN's framework, a task force tended to reproduce the DNSO structural imbalances and privilege particular constituencies' positions.[334] This was especially relevant to the type of discussion

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[333] The WG Review attracted more than 250 participants (see *WG-Review,* Younger, February 27, 2001) and "generated over 3100 comments and has maintained a level of membership far in excess of any other working group to date" (*WG-Review,* Younger, March 25, 2001). According to the Chair's testimony, "[w]hen finally the Names Council approved the working group, they gave me just one month, including the Christmas and New Year holidays! They asked me to come up with a report until January 15th! I was a little bit nervous about whether people were to come, but, unexpectedly, there were so many people, because this was a controversial working group. At the time, people had a lot of complaints about the ICANN itself, and that [working group] was their only exit. And they [the people] produced the working group report. The first report was presented to the Board, which Board didn't take any action, and even ignored it. It was like a systematic mechanism to ignore our working group, because, at the time, there was a task force to do a review too, and the Chair of the task force tried to ignore the working group report. It was just incorporated as one view rather than as an independent report to the Board" (interview with the author, May 3, 2002).

[334] Among the seven constituencies, only two were particularly critical of the structural arrangements of the DNSO: the Non-commercial Constituency and the ccTLD Constituency. The former insisted on the need to create an IDNHC and continue to channel the consensus process through working groups. As for the latter, the Review TF member Elizabeth Porteneuve urged her ccTLD Constituency colleagues to press on the need of restructuring the SO: "The DNSO Review work is underway… It is my understanding that some of you consider the DNSO reform is a necessity – this is an opportunity to comment from the ccTLD perspective and propose for revision by the ICANN Board" (*WG-Review,* Porteneuve, October 2000).

conducted in the WG and in the TF: an open accumulation of comments vs. a structured and regulated flow of comments in response to a questionnaire, for instance.[335]

It came as no surprise, then, that while the Review TF report contained "suggestions" for "improvements", aimed at preserving the *status quo* in the DNSO, the WG Review proposed bold structural changes in the Supporting Organization.[336]

The distinctive differences between the DNSO Review (TF) Report and the accompanying contributions (one of them belonged to the WG Review), was noticed by the Board at the ICANN meeting in Accra, Ghana (March 13, 2001). Consequently, the DNSO Names Council was asked to separate the proposals into those that improve operations of the DNSO as it was already constituted, and those which may result in changes in the structure of the DNSO and major changes in its functioning (see BM 13 03 01).

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[335] In a message titled "Review Task Force vs. Review Working Group" (*WG-Review,* February 24, 2001), Danny Younger, one of the most active participants in the Review WG, cautioned the Board: "The Names Council has chosen to scrap the Working Group model in favor of a new Task Force approach... This plan to replace a viable bottom-up consensus-forming criticism-generating model with a new top-down gerrymandered model should be a matter of great concern to the ICANN Board. The Task Force approach has not proven itself to be a functional mechanism. A Task Force/Working Group comparison is in order... In examining the complete public record of Task Force member comments, one is hard pressed to find substantive discussion of the issues they were mandated to investigate, and one cannot find any comments that reflect discussions on recommendations ultimately put forth".

[336] Among the proposed "improvements" were: 1/ of "the overall performance of the DNSO, both structurally and procedurally", as a result of "further study to find ways to include expertise..., improve management of the consensus process"; 2/ of "the communications within constituencies, and between constituencies on the NC"; and 3/ in the means of communication between the NC and the Board, "to ensure that the NC is consulted on an ongoing basis, and DNSO input can be constructive". The Review TF concluded, as well, that "under the current system of an open model they [the working groups] have proven to be less effective than they could be. DNSO working groups are valuable for identifying perspectives, education on the issues, and even identifying areas where perspectives appear to merge. But the make-up of DNSO working groups has catered towards those who have the time and inclination to show up at any given moment, and are not necessarily in a position to reflect a consensus of the Internet community. Therefore DNSO working groups... should be viewed as valuable intellectual input into the consensus development process; but they cannot be presumed to be the consensus-development process itself" (see *WG-Review,* February 17, 2001). The only "suggestion" that, perhaps, reflected the community's mood, concerned the establishment of an Individual Domain Name Holders Constituency.

Yet, the Names Council, controlled as it was by particular commercial interests, was not eager to comply with the Board's directive or to succumb to the community's pressure. When the implementation of the DNSO Review recommendations was discussed by the Names Council members in Montevideo, Uruguay (September 8, 2001), there were some really angry voices complaining that the implementation process was moving too slowly and was confusing; that the Names Council was protecting existing constituencies by creating an impasse; and that, although the criteria for creating new constituencies were clear, this task was not a high priority on the Names Council's agenda (see NCM 08 09 01).

In effect, the DNSO review process revealed the escalating reformist sentiments in ICANN, espoused by the ccTLD operators, who, by the Fall of 2001 had developed a project for a separate ccTLD supporting organization in ICANN, the RIR operators, and the non-commercial stakeholders, in general (for creating an ALSO, for instance).

6.2.3. The Staff intervenes in the name of efficiency

Faced with a malfunctioning key supporting organization (the DNSO), while task- and time-bound by the MoU with the DoC, ICANN came up with a kind of compensatory mechanism for efficiency; that is, the Staff[337] openly took over the formulation of policy proposals to the Board. By mid-2000, when all DNSO working groups ceased to exist,

[337] Meanwhile, the number of ICANN Staff members increased from only five people, at the beginning, to ten full-time and two part-time employees by mid-2000 (see NCM 14 07 00). All of them were U.S. citizens (see NCM 08 03 00). At the same time, the first expert was hired in ICANN as a consultant for the ALM program. By the time President Lynn made his case of a reform in ICANN, there were already 15 employees (according to Roberts in the interview with the author). The increasing number of Staff members, arguably, reflected the improving financial situation in ICANN, as is discussed further on.

the practice became so pronounced that it stirred some concern even among the Board directors.[338]

From the analysis of the ICANN community's discourse, it can be inferred that a number of factors contributed to the gradual substitution of the top-down decision-making for the open consensus-building process.[339]

It can be suggested, nevertheless, that the Staff, itself, was striving for a more proactive role in the decision-making process, considering its persistent tacit opposition to the implementation of the At-large Membership project and the election of nine At-large directors on the Board.[340] The ICANN Counsel Joe Sims, for instance, who was perceived by the critics as an ultra-conservative, yet influential figure in the Corporation, argued that "if stability is our objective, we should postpone any movement to an At Large membership or Directors until ICANN is up and running successfully; after all, we have had enough trouble getting consensus out of those who make up the Supporting Organizations – much more homogenous group than the population of the world" (see *Comments Online,* Sims, October 23, 1999).

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[338] At the Board meeting in Yokohama (July 16, 2000), for instance, one of the remaining Initial Board members, Linda Wilson, expressed concern that a resolution proposed by the Staff "might be viewed as delegating too much policy formulation authority from the Board to the Staff". The resolution in question (00.47) was dealing with the most contentious substantive issue in ICANN – the creation of new gTLDs. Despite the explanation provided by the Counsel Joe Sims that "[t]he board would retain the ultimate decision-making power based on recommendations given to it by the ICANN Staff", the draft resolution was edited "to reflect that the Board would review the selections [of new gTLDs] before announcement of selection for negotiations" (BM 16 07 00).

[339] Thus, as Weinberg explained, "[t]he DNSO has not fulfilled its policy-development responsibilities to any meaningful extent, and has played little role in domain name policy development... Indeed, the key policy decisions relating to adding new gTLDs, as well as a proposed country code top-level domain for the European Union, are currently being handled by ICANN staff, under the supervision of the board, with no DNSO participation... The Names Council has responded to the need for consensus by formulating policies on such a high level of generality that most areas of conflict are avoided. This, however, is not a useful long-term strategy" (*WG-Review,* Weinberg).

[340] The Staff and the Board agreed, though, that, because "ICANN lacks any governmental power to compel compliance with its policies", bottom-up participation by the implementing parties in policy formulation is beneficial, because "bottom-up mechanisms tend to ensure that resulting policies are widely embraced by the implementers" (see *ICANN Status Reports.* June 30, 2000).

Michael Roberts, the Interim ICANN President and CEO, pointed to a more specific reason for the Staff's inclination towards limiting ICANN's inclusiveness: "[ICANN] is a mix of amateurs and professionals... and this frequently makes the policy process very difficult. The level of expertise varies all over the land. And, if you look at any of the ICANN public forum comment pages, you can see that... there is no more than two or three per cent of the postings... that reflect any degree of professional knowledge or perspective, or constructive attitude" (interview with the author, February 20, 2002).

Regardless of the ultimate concern – with maintaining the Internet DNS' stability, or with the differing levels of participant expertise - the Staff, indeed, had a vested interest in enhancing the effectiveness of the policy-making in ICANN, since the complete transfer of authority over the DNS root depended on the fulfillment of the original mandate.

When the DNSO working-group consensus 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. Undermined at its core, the DNSO, as the key mandated consensus policy provider in ICANN, lost its relevance.[341] In 2001, ICANN's fate was on the line and the need for a reform was the single consensus that could be detected from the discourse in ICANN.

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[341] This was the observation that Danny Younger, an active participant in the WG-Review process, formulated in early 2001: "we seem to be seeing the DNSO gradually becoming irrelevant as an institution, as more and more policy decisions are being made by an ICANN staff that drafts policy within the context of contracts and determines procedures without recourse to the DNSO. All of this has happened because the Names Council has failed to properly marshal its resources to do the best possible job in formulating policy recommendations" (*WG-Review.* Younger, February 27, 2001).

By allowing the ICANN process to divert from the innovative stakeholder-consensus-building model and slip back to the traditional top-down policymaking, the power holders in the corporation compromised the very idea of self-governance and, virtually, invited the world governments and international organizations to take over the policy-legitimizing role that an at-large membership was supposed to play.

6.3. How expensive is the global stakeholder consensus process?

When asked "what were the factors that constrained the realization of ICANN's full potential", most of the interviewees for this thesis pointed, first, at the funding problems that ICANN experienced during its formative years.[342] Developing a long-term funding formula was, indeed, a task left to the Initial Board and Management to resolve. The U.S. government's White Paper 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 (see Chapter 5.2.1).

6.3.1. In search of a financial formula

By the time the ICANN supporting-organization structure was created (March – May 1999), the sense of financial crisis was palpable in the ICANN Interim Board

[342] Jonathan Cohen, a Board member representing the DNSO (Intellectual Property interests), for instance, replied to this question: "First and foremost is the lack of money. ICANN was born an orphaned child..." (interview with the author, March 25, 2002).

discussions.[343] The Board Chair Esther Dyson asked the members to try to identify potential contributors to the ICANN Start-up Fund, especially from outside the U.S.

As a result, the creation of a system for predictable, permanent, needs-based funding became an urgent issue for ICANN.[344]

Indeed, inventing a feasible and fair funding formula for the new regime was discussed even at the first teleconference between the Interim Board and the opponents groups – the BWG and the ORSC (October 1998). From this, two funding models emerged: 1/ ICANN leasing the IP address and name space to the root zone operators, the operators of the RIRs, and the gTLD and ccTLD registry operators, based on the concept of fundamental assets proposed by the BWG; and 2/ the supporting organizations funding ICANN, as it was codified in ICANN's Articles of Incorporation.

The former reflected the critics' antagonism towards Postel's idea of distributing the policy-making power among three separate supporting organizations, consisting of the best organized stakeholders: the Internet technical community, the large business (ecommerce) community, and the trademark owners. Instead, as Auerbach proposed, it would make a better business model "to let the board run this organization, figure out

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[343] For the first nine months of its operation (October 1998 - June 1999), ICANN received total income of around US$ 708,000 and accumulated debt of around $759, 000. The crucial financial support (a total of $421.510 in donations) came from 3Com Corporation, Cisco Systems, Inc., Deutsche Telekom, and MCI WorldCom, and a number of other financial donors (see BM 04 11 99). In addition to short term working capital loans, ICANN received approximately $110,000 in application and accreditation fees from registrars (see *ICANN Correspondence,* Dyson, July 8, 1999).

[344] The above-described financial situation was contrary to the ICANN founders' expectations. As Roberts testified, "we had various promises of money, of contributions from the private sector to get ICANN going, and very little of that money, actually showed up. The process of getting a regular due structure introduced took a lot longer than expected. ICANN spent the first couple-three years of its existence with a substantial cash crunch. It was not able to hire the staff or do things that it knows how to do and wanted to do. So that's one thing. The DoC was in a great hurry to get ICANN operational and, essentially, to get itself out of the business of trying to run the DNS. The initial directors and I were a little bit naïve about the speed with which these various key parts of the puzzle could be put together. So one thing was: instead of starting operations with no money, we should've waited until there was at least a million dollars in the bank and a due structure had been put in place" (interview with the author, February 20, 2002).

based on its business plan what its income needs are for the year, and enter into explicit agreements with the operational companies rather than go through... the supporting organization of licensing these assets" (BM 31 10 98). The ultimate concern was that the "supporting organization as a middle man" model would impede on the Board's ability to control ICANN's finances, because "it does add a layer of indirection and another place for hiding money in accounting games...".

The accreditation of new registrars in the *.com, .net,* and *.org* domains (April 1999) was, in fact, based on the notion of leasing fundamental assets. The accreditation agreements contained the requirement to fund ICANN "for the right to operate a portion of the domain-name space", proportionally to the number of registered domain names.

The ICANN 1999-2000 budget, adopted on May 27, 1999, established the variable component of the registrar accreditation fee at $1 per registration/year. According to this funding formula, Network Solutions was expected to be the main funding source of ICANN, as it was still controlling around 75 percent of the registrations in *.com, .net,* and *.org* domains. In effect, this meant that the firm had to repay ICANN for its former position of monopolist registrar in the lucrative gTLD market.

In response, NSI mobilized its lobbying power in Washington D.C., and soon the ICANN plan to collect the registrar accreditation fee became an object of investigation by the U.S. Congress.[345]

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[345] In a request for information sent to ICANN's Interim Chairman Esther Dyson, (June 22, 1999), the Chairman of the U.S. House Commerce Committee, Rep. Tom Bliley expressed "great concern" about the imposition of a $1 per domain-name registration fee, and the pressure that ICANN, allegedly, had exerted on NSI to enter into a registrar accreditation agreement with the corporation in order to continue registering domain names (see *ICANN Correspondence,* June 22, 1999). Replying to this, Dyson stressed that "the requirement that NSI must be accredited by ICANN to act as a registrar after the introduction of competition... flows directly from NSI's own agreement with the USG" [Amendment 11 to the NSI

Trying to avoid further political controversy over ICANN, the DoC recommended that the Board eliminate the use of a per-registration component to its cost-recovery fee structure.[346] The Board was forced to reconsider the volume-based registrar fee as a source of funding, although ICANN needed about $2 million for its ongoing activities.[347] It decided to convene a task force on funding to make recommendations on this issue (BM 16 07 99).

The President's Task Force on Funding (TFF) was comprised of representatives of four communities: the IP address registries, domain name registries, and the administrators of gTLD and ccTLD registries.

The TFF members focused on 1/ the need to ensure meaningful limits on future growth in the ICANN budget, and 2/ the need for an improved, more inclusive, and more transparent process for setting the budget in future years (see *TFF*, October 30, 1999).

Cooperative Agreement with the DoC, September 30, 1998] (see *ICANN Correspondence,* Dyson, July 8, 1999). She reminded him, as well, that for several years NSI had been charging the general public a fee for every domain name registered anywhere in the world, at a minimum of $70 per registration.

[346] In a letter to ICANN (July 8, 1999), the DoC suggested that "ICANN should eliminate the $1 per-year, per-domain name registration user fee. Although the user fee may be determined to be an appropriate method for funding ICANN's activities, it is controversial. We believe a permanent financing method should not be adopted until after the nine elected members are added to the ICANN Board in November. By taking such a step, ICANN will ensure that this important decision is made in accordance with the representative, bottom-up process that is essential for ICANN to carry out its mission. In the meanwhile, we will work with ICANN and the entire Internet community, to the extent permitted by law, to obtain interim resources for ICANN" (*ICANN Correspondence*, DoC, July 8, 1990).

[347] Implementing the At-large Membership program was one of the tasks that were affected by the financial crisis in ICANN in mid-1999. In early July 1999, Dyson stated that "there is one severe impediment to proceeding as the MAC [Membership Advisory Committee] has recommended – the lack of funds to undertake either the outreach probably necessary to produce 5,000 members of an electorate, or the election itself... Thus... unless and until additional funding sources are forthcoming, it will be difficult to implement any such program for At large elections" (see *ICANN Correspondence,* Dyson, July 8, 1999). In August 1999, the Board directed the President and the Staff "to seek to obtain the necessary funding to conduct the election of the initial At-large Council" (see BM 26 08 99). Consequently, the Markle Foundation issued a grant of $200,000 for the At-large Membership program. In October 2000, Roberts reported that "ICANN's out-of-pocket costs for the at-large membership program were slightly over US$300,000", and there would be substantial costs "involved in the upcoming at-large study and in continuing to operate the at-large web site" (see BM 17 10 00).

Both issues concerned the need of establishing control over ICANN's Budget and mechanisms for the Board's accountability.

On the first issue, the TFF Final Report (October 1999) cautioned against possible "mission creep", under pressure on ICANN to expand its reach into areas outside its "limited-purpose technical coordination" mandate. Consequently, this would lead to "unrestrained budget bloat". Apparently, the major concern was with involving ICANN in the domain-name content regulation under a government requirement influenced by the trademark interests.

In addition, it was realized that the steady exponential growth of the Internet's DNS could generate greater revenues for ICANN than its budget required. As a non-profit corporation, ICANN was functioning on a cost-recovery principle, and the community consensus was that "the mechanisms established for the recovery of ICANN's operating expenses should have built-in limits such that mere operation of a revenue formula does not generate income over and above approved expense targets" (*TFF*. October 30, 1999).

On the second issue, to enhance accountability, it was recommended that the Board improve ICANN's budget process by involving the entities providing the funds in the budgeting process.[348] To "foster confidence in the long-term integrity of the budgeting process", the Management was advised to involve the rest of the ICANN community in reviewing the proposed annual budget and discuss it prior to its adoption at a Public Forum at least.

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[348] The particular measures included transmitting the proposed budget via email directly to each name and address registry and each gTLD name registrar for review and comment; convening a meeting among the Board and representatives of the funding parties "to seek consensus on areas of controversy", and, finally, provide these parties with a quarterly update on ICANN's financial situation.

In accordance with the White Paper, the principle of fair allocation of ICANN's annual budget was established: all ICANN constituents benefiting from ICANN's coordination and pro-competition efforts should contribute to its budget, and those were the name and address registries and registrars – the parties with whom ICANN was expecting to have contractual relationships. This translated into a scheme of aggregate shares among classes of ICANN constituents (see Table 7):

Table 7. Allocation of the ICANN 1999-2000 budget contributions

Stakeholder group	Share	
gTLD registrars	50%	$2,101,000[349]
gTLD registry (Network Solutions, Inc.)	5%	$250,000
ccTLD registries	35%	$1,496,000[350]
IP address registries	10%	$428,000

Total revenue: $4,275,000

The TFF recommendations concerned the distribution of the global shares to individual organizations within the classes of ICANN constituents. In the presence of NSI – the single registrar that dominated the gTLD names registration market, the gTLD registrars had reached a consensus to apply a volume-based formula. As for the ccTLD registries, they had to determine among themselves which was the fairest formula for

[349] Controlling two-thirds of the gTLD registration market, Network Solutions, Inc. had to pay about $2 million of this amount.

[350] It was noted in the TFF Final Report that, when divided among the existing 244 ccTLD registries, the average individual registry share would amount to less than $6,000 per year. Yet, as Roberts pointed out at the Public Forum in March 2001, "[p]roportionality of funding continues to receive much attention from Staff, community. Thirty largest domain name registries account for 90 percents of DNS, while the other 200 are the other 10 percent" (PF 12 03 01).

distribution: volume-based, banded tiers according to size, or a flat fee per ccTLD registry. Recognizing the vast diversity of ccTLD registries, the TFF noticed "the lack of a single global framework in which to discuss these issues, and the absence of many ccTLD registries from existing forums on ICANN issues". As discussed before, the ccTLD global community was, indeed, divided in its consensus-building efforts along regional lines, with the North-American and European countries leading the process, and the rest of the ccTLD registries following them.

Besides the regular contributors to the ICANN annual budget, by October 2000, the corporation had found another source of significant one-time funding – the firms competing for sponsoring or operating a new gTLD registry, which were charged $ 50,000 non-refundable application fees each. These, eventually amounted to $ 2 million.

6.3.2. Modifying financial power into negotiating power

Being major ICANN income-contributors provided certain stakeholders with high bargaining power. As Karl Auerbach, the North-American at-large director on the Board, explained, "the domain name registry/registrars – they are the [main] source of income for ICANN, so ICANN listens to them, although through the new contractual regime ICANN has locked in that cash flow, so the registries/registrars have kind of lost their ability to manipulate that cash flow and get their will listened to. The IP address registries and the ccTLDs – right now these are the two groups that have the most power in ICANN, because they have money and ICANN wants it. The regional address registries want independence from ICANN: just ICANN to let them be alone and ICANN merely

be a shield between them and government. They are paying ICANN several million dollars for that privilege - they have not yet paid that money, but ICANN is still listening to them. The same is with the country-code people – they've realized that ICANN in no way can take away the country codes. So they're playing a very careful game - they are well organized (two hundred and something) and they are big entities, because they are associated with countries... They are a group that someone can label stakeholders, so [by] using their very privileged position, [they can] manipulate the flow of cash in ICANN in order to get the attention of the ICANN management" (interview with the author, May 3, 2002).

Network Solutions, for its part, while being the main target of ICANN's pro-competition efforts, was able to secure its role as the registry for the *.com, .net* and *.org* domains, to waive off the requirement in Amendment 11 to the Cooperative Agreement between NSI and the U.S. DoC (October 1998) to separate its registrar and registry functions. All of this was possible simply because half of the ICANN annual budget, in its transition period, depended on the NSI financial contribution. In fact, it was only after the package of three-party agreements was signed by NSI (November 1999) that the sense of a financial crisis in the corporation vanished, because the principal funding source had assumed its obligations towards ICANN.

The numerous 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. 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

BM 17 10 00). Apparently, they had used the "money power" as leverage in their contract negotiations with ICANN.[351]

In fact, this came as a result of the open rejection of the ICANN-allocated shares, organized by CENTR.[352] Thus, after receiving invoices from ICANN (April 2000) for the shares of the individual ccTLDs, based on the number of domains registered, the largest regional group of ccTLD operators – CENTR - openly rejected the ICANN-allocated funding share to the ccTLDs.[353]

6.3.3. The DNSO financial crisis

By the time ICANN began stabilizing its financial situation[354], the sense of financial crisis had begun to permeate in the DNSO. Although an immanent part of ICANN, the three supporting organizations were financially independent from the

[351] At a Board meeting (October 17, 2000), it was discussed that "[a]lthough many of the ccTLD operators that have not yet made their full contributions are supportive of ICANN and its goals, they are reluctant to make the contributions until more progress is made toward an agreement defining their relationships with ICANN. This progress has been slow due to differences of views among the ccTLD operators, the governments of the nations and territories involved, and other stakeholders in the global Internet community who are affected by the operation of ccTLDs" (BM 17 10 00).

[352] Indeed, in its report to the U.S. Congress, the General Accounting Office (GAO) pointed out that "[s]ome officials of a group representing 30 nations, mostly in Europe, are encouraging members to disregard invoices. South Africa, in an email indicating that it cannot afford to pay its $17,520 share, stated that the charge amounts to an 'arbitrary tax'. ICANN cannot cut off Internet access to a nation's domain; thus, ICANN lacks a method of enforcing payment of these funds" (U.S. GAO, July 7, 2000).

[353] At the CENTR General Assembly meeting in Norway (June 1 – 2, 2000), it was stated that "[a]ny request by ICANN for a funding contribution based on the number of domain names is fundamentally unacceptable to CENTR members… since the service that ICANN supplies for the individual registries is by no means dependent on the number of domains and is basically identical for all the registries". In addition, it was claimed that there was no a legal basis for the required funding as the proper framework agreements had not been concluded yet.

[354] At the Public Forum in March 2001, the President reported that "ICANN is in good financial health. $2 million in the bank. Paying bills. Extreme financial difficulties are behind us…" (see PF 12 03 01).

corporation. They were expected to provide funding from their own resources[355], and not to rely on ICANN's budget.

Working on the funding of the consensus process, the DNSO Names Council decided (September 30, 1999) that each constituency should commit $5,000 in order to begin covering the DNSO expenses, estimated in the range of $300,000 per year.[356] The Non-commercial Constituency objected to that amount, but the reply was that "the reality is if you want to be on the table you should pay" (see NCM 27 10 99).

In practice, though, it proved extremely difficult to collect these shares.[357] The constituencies' reluctance was explained by Elizabeth Porteneuve, the ccTLD constituency representative on the Names Council, in the following way: "The main difficulty for a budget is not the amount, less than 5 percent of ICANN budget, but the layered system. Another important item is that the DNSO's members are providing 90 percent of all ICANN budget, therefore reluctance to raise additional amounts. Furthermore, the outstanding part of this ICANN budget comes from outside of the U.S." (NCM 31 03 00).

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[355] In the search for funding sources for ICANN, the TFF had concluded that "[t]he SOs are loosely organized, bottom up organizations designed to be inclusive with regard to participation of practicing professionals. This style of organization, and the policy charter, do not lend themselves to the type of organizational structure that could be relied on for significant funding amounts, and the existence of a requirement for such amounts, perhaps in the millions of dollars per SO, would be a substantial, if not fatal, impediment to the accomplishment of the primary policy-making mission of the organizations. The Task Force endorses the Board's current view that while it is entirely appropriate for the SOs to fund their own relatively modest expenses, they should not be regarded as sources of mainstream financial support for ICANN" (*TFF,* October 30, 1999).

[356] At that time, there was a concern among the Names Council members that the transparency and openness of the consensus process in the DNSO could be compromised because of the lack of funding. In December 1999, Andrew McLaughlin, the ICANN Chief Financial Officer, informed the DNSO Names Council that its debt with regards to meeting rooms in 1999 "may be cleared up by ICANN budget" (see NCM 15 12 99). In February 2000, the Names Council requested formally that ICANN reimburse the DNSO debt of $2,600 to Berkman Center for webcasting (see NCM 18 02 00).

[357] Among the constituencies that had not paid their shares to the Names Council budget were: Registrars, ccTLDs, Business, Non-commercial, and ISPs constituencies (see NCM 08 03 00).

In the next two years, the ever increasing constituency shares put pressure especially on the Non-commercial Constituency.[358] Despite the request for a 50 percent reduction of the constituency's debt, the attitude of the Names Council members, in general, was that the right to participate in the policymaking process was linked to financial obligations.

To recover the constituency's outstanding dues, the Names Council adopted a mechanism for the enforcement of constituency fees (April 2001), which envisioned even a constituency losing its voting rights for lack of payment.[359] The legitimacy of this measure was contested by the Non-commercial Constituency (Mueller), and the Names Council was reminded of the request for 50 percent reduction of the constituency's fees (Park).

Under the above-described financial strain, in the Spring of 2001, the DNSO Names Council was facing complete paralysis, in terms of secretarial services, the listserv hosting, and the maintenance of the web sites (see NCM 11 03 01). A motion to ask the Board for a $100,000 start-up fund for the DNSO secretariat was approved, which was a rather grim acknowledgement of the fact that the stakeholders were more willing to

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[358] The 2000 DNSO budget of $95,500 expected each constituency to pay a share of $13,643. When the 2001 DNSO budget was discussed, though, in January 2001, it was established that "funding by dues is the basis to meet expenses", which amounted to $107,600. Thus, each constituency was required to contribute $15, 371 (see NCM 24 01 01).

[359] The NC "Procedures for Constituencies Payment of Dues" comprised six stages: 1/ invoices are mailed/e-mailed to representatives of Constituencies; 2/ if payment is not received by the DNSO in 30 days, the Constituency is sent a reminder letter and another invoice; 3/ in 30 more days, the Constituency is sent a delinquency notice, which is posted on the DNSO website, as well; 4/ in 30 more days, the Constituency is sent a "show cause notice" (to show cause as to why their voting rights in the Names Council should not be suspended) and they are charged a 5 percent late payment fee; 5/ in 30 more days, the Constituency is sent a "final notice to pay" and additional 5 percent late payment fee is charged; and 6/ finally, in 30 more days, the voting rights, but not the right to participate, of that Constituency's representatives to the Names Council are suspended until the past due amounts are paid (see NCM 16 08 01).

financially support the decision-making level of ICANN – its Board of Directors - than the, presumably, consensus policy-development process in the Corporation.[360]

Ultimately, the Names Council request for funding was declined (see PF 03 06 01).[361]

Overall, in the first two years, the Corporation struggled to collect stakeholder contributions to its budget. The way in which funds were managed was an issue neglected by the participants. 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. This coincided with the election of the five At-large Directors on the Board, which changed the dynamics of control over the fund management in ICANN.

Thus, Auerbach, the at-large director for the North-America region, asked to inspect ICANN's financial records. No other director before him had requested such access, although ICANN's founding documents provided them the right to do so. After only nine months ICANN was able to present certain procedures for allowing a director access to its financial records. The set of procedures had not been published for comments, though, and, in addition, some restrictions on the use of the records were placed on the Board.

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[360] As the NSI representative reminded his colleagues, "the spirit of the voluntary funds was to demonstrate community support for the DNSO" (see NCM 10 04 01).

[361] It was only in May 2001, when the Names Council approached its fund management according to a systematic strategy, including: 1/ signing a MoU with ICANN management on behalf of the DNSO, under which the Staff would serve as a custodian for the funds raised by voluntary donation to the DNSO; 2/ begin immediate efforts to raise and collect voluntary donations to the DNSO – funds primarily designed to cover the costs of providing professional support to the Names Council; and 3/ search for secretarial services – information management and technical support. Despite the organized efforts of the Names Council's Budget Committee, by September 2001, not all constituency fees had been collected yet, and the total amount of the voluntary fundraising remained low.

In response, Auerbach filed a lawsuit against the Corporation. He alleged that ICANN had denied his legal right to inspect and copy ICANN records (see *Other Archives,* March 18, 2002).[362]

After the judge ruled in Auerbach's favor, ICANN announced that Auerbach had been provided with materials in electronic form that did not raise confidentiality issues, and, simultaneously, posted on its website copies of all these materials (i.e. ICANN Employment Policies, ICANN Chart of Accounts, DNSO Financial Readers for 2000, 2001, travel logs) (see *Other Archives,* August, 4, 2002).

In essence, the Auerbach v. ICANN case illuminated the basic controversy of the "private-corporation-acting-in-public-interest" formula, embodied in ICANN. The ICANN management had a particular understanding of where a director's loyalty lay: "Auerbach argues... that he might owe a fiduciary duty to the general public, in addition to the duty owed to the corporation, because ICANN is a nonprofit public benefit corporation. But... he 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 *Other Archives,* July 29, 2002, 12).

Indeed, private vs. public constituted a major debate in ICANN. 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)'

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[362] In response to this lawsuit, the Corporation claimed that Auerbach had "steadfastly refused to inspect ICANN's documents", because he objected to the procedures that ICANN's management had established. Auerbach, himself, was described as someone "more interested in damaging ICANN's ability to function than in the inspection of any particular records" (*Other Archives,* April 17, 2002, 19), "far more interested in being quoted in news stories or testifying before Congress than in seeking collective solutions on the Board" (13).

discretion. The Staff's and Interim Board's self-perception was that of steering a centralized decision-making process, which included public consultations, where compliance was sealed by contractual agreements with the parties.

The stakeholder consensus process, though, presumed that, to sustain broad participation in the decision-making, complete openness and transparency should be the "rule of the game". The bottom-up model relied on the binding force of voluntary participation in the decision-making process. The numerous revisions of ICANN's Bylaws, before the corporation was recognized by the U.S. government, aimed at a participatory structure that enabled consensus-generating to begin in the supporting organizations (via working groups and task forces) and end with the Board voting.

In contrast, as the discussion in Chapter 7 on the process of generating substantive policies in ICANN will demonstrate, the decision-making process gradually concentrated at the top, as the discussions in working groups and task forces, which lasted for months but often generated only limited consensus, were discarded as ineffective.

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 the above-presented case illustrates.

Chapter 7. Generating substantive policies in ICANN

After discussing the difficulties within ICANN in both establishing contractual relations with principal stakeholders and implementing the model of a multistakeholder collaborative process, I turn now to the third major development line in ICANN – the process of generating substantive policies in the Internet DNS management.

According to the ICANN Interim President Michael Roberts, although the Corporation's original mandate encompassed three policy clusters[363], 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).[364]

Thus, in the formative years certain issues were prioritized in ICANN's policy-making agenda, 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).

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[363] Those were: 1/ technical and engineering standards for the DNS; 2/ business practices associated with the registration of domain names; and 3/ the interaction between IP number addresses and the domain names.

[364] Roberts provided the following assessment: "If you ask yourself, where has ICANN, actually, made policy, where are things different because of ICANN... In the address area, there's been almost no new policy made... In the protocol [area], [there] are very little, only some associated with the multilingual domain names, now called internationalized domain names...; there is also the issue of the Enum business, which is at the intersection between the international telephone dial plants and IP telephony... And, then, the third area is the domain names, and there's been a lot of policy made there. The reason for this is because the government created a monopoly with the Network Solutions' control of the *.com, .net,* and *.org*..." (interview with the author, February 20, 2002).

7.1. Fulfilling a dynamic policy agenda

Creating and regulating a competitive market for registering gTLD names constituted ICANN's mandate at the point of its inauguration. ICANN was required by the DoC to complete its part of the joint project by September 30, 2000. Those first two years (1999 and 2000) were considered a "transitional period" leading to ICANN assuming full responsibility over the Internet root management.[365] They marked a frenetic period of undertaking all substantial and organizational tasks formulated by the MoU at once.[366]

The WIPO recommendations[367] 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. To subject it to the emerging consensus-seeking discussion process, the DNSO's Names Council created three working groups: WG-A - on the Universal Dispute

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[365] The MoU with the U.S. DoC provided that "the Parties will jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibilities for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity" (see *Milestone Documents.* November 25, 1998).

[366] In the First Status Report to the DoC, the Board presented a list of "important actions and decisions" completed since the MoU, or under development. Among them were: 1/ creation of four advisory committees to the Board: Membership Advisory committee, Government Advisory Committee, Root Server System Advisory Committee, and Advisory Committee on Independent Review; 2/ adoption of registrar accreditation guidelines, the accreditation of five testbed registrars, and the provisional accreditation of 37 post-testbed registrars, which marks the beginning of opening the domain name registration market to competition; 3/ receipt of the WIPO recommendations on protecting trademarks and intellectual property in the domain name space and the referral of those recommendations to the DNSO for consideration via a bottom-up consensus process; 4/ recognition of the DNSO as well as of six of its seven initial constituency organizations, and provisional recognition of PSO; 5/ receipt of the Membership Advisory Committee recommendations and referral to staff for implementation, which is the beginning of the most difficult organizational issue in ICANN – the creation of a consensus-supported concept of an at-large membership and its consecutive implementation (see *ICANN Status Reports.* June 30, 1999).

[367] See WIPO, 1999.

Resolution Policy (UDRP), WG-B – on "famous trademarks" protection, and WG-C – on creating new gTLD issues.

As the analysis presented in the current chapter demonstrates, though, only two of the domain-name registration market-related policies were open to broad stakeholder participation and discussions aimed at reaching consensus, namely, the famous trademark-protection and the new gTLDs issues. As discussed below, the availability of open format working groups in those cases did not preclude certain stakeholders from engaging in other effective power strategies, such as private inter-constituency negotiations, to reach agreements and impose them as consensus points on a whole working group.

As for the Registrar Accreditation Policy and the development of the UDRP, those policy items were developed outside ICANN (by the U.S. DoC and the WIPO, respectively), and ICANN was used only to legitimize them and, thus, assure the service-providing stakeholders' compliance.

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 discussed in this chapter. The scope of the consensus reached, itself, varied depending on whose stakeholder positions were involved and were taken into consideration.[368]

When most of the new regime regulations were codified in "voluntary" agreements - around the end of 2000 - there were only a limited number of substantive

[368] For instance, the WG-B on famous trademarks protection produced consensus points reflecting inter-constituency negotiations between the registrars and trademark owners. Nevertheless, because of the vocal opposition of a handful of free-market champions, an attempt was made to accommodate the Non-commercial Constituency's position against a centrally coordinated list of famous trademarks to be protected in the DNS, and a sunrise period of pre-registering trademarks as domain names. The former recommendation was omitted, and the scope of the latter was limited only to commercial gTLDs.

issues in ICANN's agenda to consider.[369] The most challenging among them was the "internationalized domain names" (IDNs) issue, which concerned the reconceptualization of the DNS along language lines (the ASCII vs. the non-ASCII character sets)[370], with the accompanying registration expansion problems – cybersquatting, consumer confusion, etc. Another important issue, especially after September 11, 2001, was the security and stability of the DNS. Both issues required a certain level of technical expertise, and, while being of "public interest", were not made accessible to the participants at-large.

In addition, ICANN was forced to deal with a cluster of service-enhancement issues, resulting from the maturation of the domain-name registration market.[371]

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[369] The following comment, provided by Roberts, confirms this observation: "There isn't a lot of domain-name policy to be made any more. Jon Postel developed a body of policy much of which is still in place, and where those policies didn't work very well were mostly on the commercial side of the domain-name registration business. If you look at the MoU [with the DoC], those items tend to focus on domain-name issues and most of them have been dealt with: the retail competition, the wholesale competition, the dispute mechanism. My feeling is that there, probably, would be only one or two significant policy items that would come up in a year for ICANN. So, right now, when you look at all these committees, and councils, and the Board, and so forth, it's too much, it's overweight for the amount of real policies in need of making" (interview with the author, February 20, 2002).

[370] ASCII stands for American Standard Code for Information Interchange. As explained, "[t]his is a character set and a character encoding based on the Roman alphabet as used in modern English. ASCII codes represent text in computers, in other communications equipment, and in control devices that work with text. Most often, nowadays, character encoding has an ASCII-like base" (see http://en.wikipedia.org/wiki/ASCII).

[371] Among those were: 1/ Redemption Grace Period – domain name holders are allowed a 30-day period to reclaim their name if it has been unintentionally deleted from the registry database, thus, saving them money and worry (Vint Cerf, the Board Chair, clarified that, because there was "a widespread consensus..., the Board acted very quickly to adopt that position [allowing a grace period]" (interview with the author, August 5, 2002); 2/ Streamlined domain-name transfers – a domain-name transfer policy which allows domain-name holders to transfer management of their domain name from one registrar to another (in his testimony before the U.S. Senate Committee of Commerce, Science, and Transportation – September 30, 2004, Paul Twomey, the current ICANN President and CEO, explained that this policy was developed "[a]fter significant study and discussion, and working with the accredited gTLD registrars" (see Twomey, September 30, 2004), and 3/ Wait-listing Service (WLS) – a highly controversial VeriSign proposal to allow potential registrants to purchase subscriptions tied to domain names currently registered before they expire (for three years, ICANN could not agree on the merits of that proposal, which constituted the reason for VeriSign to file a lawsuit against ICANN in February 2004, complaining that ICANN was blocking innovation by failing to move foreword with the WLS; the critics, though, claimed that the proposal was an abuse of VeriSign's monopoly control of the *.com* domain registry, it would crush dozens of small companies that thrive on selling domain names, thus harming competition in the secondary market, and it would make it easier for big companies to snap up expired domain names, at the expense of the end user).

After 2001, ICANN's attention shifted to restructuring and reforming the Corporation in the name of a more limited technical mandate and efficiency (see Chapter 8). The 2002 Reform process was provoked by the deepening identity crisis of the corporation, stemming, partially, from the fulfilment of the original market-creation and regulation mandate.

In fact, these shifting dynamics in ICANN's activities, observable in 2001, were noted as a major reason for Stuart Lynn's decision, as the new CEO of ICANN, to call for the significant reform of ICANN.[372] The intense focus on the reform required redirecting the scarce ICANN resources from the previous tasks.[373] The perception of a lack of effectiveness in the implementation of the policies, because of the refusal of some key stakeholder communities to get into contractual relations with ICANN, precipitated Lynn's Report, which, in turn, induced a broad passionate discussion about the changes needed in ICANN.

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[372] The ICANN *Fourth Status Report to the DoC* stated that "[t]he progress toward completion of the Joint Project slowed markedly following the Third Amendment of the MoU. In large part, this reflected the fact that the tasks that were largely or completely within ICANN's control had been completed, and those remaining required the cooperation of various third parties, which has varied dramatically from task to task. In turn, this was a major reason for Stuart Lynn's decision, as the new CEO of ICANN, to call for significant reform of ICANN. Dr. Lynn concluded, after his first year in office, that while real progress had been made, substantial changes were required if ICANN was to continue to make progress in the future" (*ICANN Status Reports,* August 15, 2002).

[373] In its *Fourth Status Report to the DoC* ICANN pointed out that "[t]he considerable progress on these and other aspects of ICANN's reform efforts has been accomplished over a very short period of time for a task of this complexity, namely the past five months. This 're-setting' of ICANN is essential to future progress, and it necessarily has meant that the very limited resources of ICANN have not been focused as intensely on many other tasks. This has probably slowed progress on these other tasks – one consequence of the historical underfunding of ICANN" (*ICANN Status Reports,* August 15, 2002).

7.2. The process and the outcomes: an overview of some major substantive policies

The following chart presents in chronological order the main substantive policies as developed and implemented by ICANN. Next, the decision-making process and the key (consensus) policy outcomes are outlined for each item.

Table 8: Substantive policies: timeline and decision-making

Timeline	Substantive policy	Method of decision-making
January 1999 – April 2000	**1/ Registrar Accreditation Policy: introducing competition to domain-name registration services**	Public consultation on a Draft Contract written by the Staff.
June 1999 – July 1999	**2/ Uniform Dispute Resolution Policy (UDRP): trademark protection in the DNS**	Time-limited multistakeholder consensus process in WG A; a discussion could not unfold; the WG A recommendations echoed the WIPO proposal.
June 1999 – July 2000	**3/ Famous Trademarks Protection**	Full-fledged multistakeholder consensus process in WG B developed in stages: 1/ surveying opinions, 2/ generating proposals. Inter-constituency negotiations reaching agreement on mechanisms of trademark protection. Public comment solicited.
June 1999 –	**4/ New gTLDs Selection**	Full-fledged multistakeholder consensus process in WG C developed in stages:

November 2000	**Policy: expanding the DNS**	1/ Agenda-setting stage: controlled by the WIPO. 2/ Consensus-development stage: extensive, long-lasting open-participation WG C discussion, leading to position papers and a recommendations report. 3/ Implementation stage: expert evaluation of proposals, followed by public-comment period. 4/ Contractual-development stage: public comments solicited. 5/ Operational-development stage. 6/ Assessment-development stage: led by the Management.
August 2000 – October 2003	**5/ Internationalized Domain Names Policy**	Agenda-setting stage: stakeholders exert pressure on ICANN to get involved with the IDNs registration policy-setting. ICANN preferred to monitor the VeriSign testbed experiment. Informative stage: a workshop, and a questionnaire (before March 2001 meeting). Examination of the IDN policy aspects: a multitude of ICANN entities create units working groups or task forces (the GAC, the DNSO, the IP constituency, and later the ccTLD Constituency). The Board established a fact-finding working group to survey the ICANN community. Establishing ICANN's position on IDN issues: the Board's IDN Committee issued a series of position papers on key IDN issues. At-large participation and stakeholder consensus were not involved. Monitoring the IDN registration implementation stage: after the IETF approval of standards for IDNs, ICANN stays consistent with its monitoring/educational role. The President's IDN Registry Implementation Committee provided a

		forum for registry operators, registrars, and technical experts. Internet business and end users were excluded. Policy-setting stage: controlled by the Management, with public comment solicited. Agreement-setting stage: controlled by the Management.
November 2001 – in progress	**6/ Security and Stability Policy**	Emerges in the ICANN agenda after September 11, 2001 – the annual meeting (November 13 – 14, 2001) was dedicated to DNS security issues. President's Standing Committee on Security and Stability created; in 2002, it was renamed the Security and Stability Advisory Committee (SSAC). Mandate: developing a policy framework for ICANN's responsibilities. Membership: comprised exclusively of experts; Internet users have not been involved.

1/ Registrar Accreditation Policy: introducing competition to the domain-name registration services

Introducing competition in the gTLD registration market by breaking the NSI's monopoly was one of the four guiding principles established by the White Paper.[374] As stated in the ICANN First Status Report to the DoC, the series of guiding principles "seemed at the time to have wide-spread support within the Internet community from both private and public commenters" (*ICANN Status Reports,* June 15, 1999). This,

[374] The White Paper stated that "[w]here possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction" (see U.S. DoC, June 5, 1998).

partially, explains the speed with which this policy was developed even before the DNSO was formed.[375]

The real reason for not subjecting this policy issue to a consensus process, though, was revealed by Roberts: "the U.S. government had already decided what it wanted to do and it mandated that to us, and just told us to do it. In fact, I was unhappy when I first took over as a President in November and December of 1998 that the Board was not being given any opportunity to discuss how it ought to go about introducing the registrar competition. We were just told what to do. This was a policy decision by the government that we had to carry out" (interview with the author, February 20, 2002).

The implementation phase was more problematic, though, considering the NSI's refusal to accept the registrar accreditation policies. Although NSI was required to create a Shared Registration System interface, in order to enable a testbed period to begin, it was delaying the completion of this task.

Nevertheless, by June 2000, ICANN had already accredited approximately 110 registrars. As a result, the net share of new registrations attributable to NSI dropped to under 50 percent, and retail registration pricing decreased from $35 per year to $10 per year, with some registrars even offering "free" domain-name registration as part of larger service packages.

In its *Second Status Report to DoC* ICANN reported that the task of introducing competition to the domain-name registration services had been completed (see *ICANN Status Reports,* June 30, 2000). Four years later, in May 2004, when the number of accredited registrars had climbed to almost two hundred, the ICANN Board stated in a

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[375] A *Statement of Registrar Accreditation Policy,* written by the Staff, was adopted by the Board still on March 4, 1999 (see BM 04 03 99).

resolution that "the competitive registrar marketplace introduced by ICANN in 1999, has been successful in driving down prices to consumers and businesses for gTLD domain registrations" (BM 11 05 04).[376]

2. Uniform Dispute Resolution Policy (UDRP): trademark protection in the domain-name space

The development of a UDRP was the second-highest priority issue for both ICANN and the DoC after introducing competition in the gTLD registration market. The need for an alternative dispute-resolution mechanism in domain-name registration stemmed from the desire of the trademark owners to curb the transaction/litigation costs which occurred when the court system was used.[377]

The WIPO was able to influence the U.S. government in the process of preparing its DNS-management privatization policy, and the White Paper set out certain views on intellectual property issues[378]: 1/ all interested parties "should have access to searchable databases of registered domain names"; 2/ domain name registrants should be required to "pay registration fees at the time of registration or renewal"; 3/ domain name registrants would agree to "submit to and be bound by alternative dispute resolution systems"; and 4/ the new corporation would protect "certain famous trademarks from being used as

[376] A decision was approved to create an Expert Advisory Panel "to gather facts and assess issues affecting the competitive registry – registrar marketplace and ICANN's Registrar Accreditation Policy" (BM 11 05 04).

[377] Mueller (2002) makes the point that "[a]t least since the gTLD-MoU, intellectual property interests had insisted on directly linking management of the DNS root with trademark protection functions in order to reduce their transaction costs" (190).

[378] Interestingly, the Green Paper questioned the need for a uniform dispute resolution policy, and suggested that gTLD registries be required to select their own dispute resolution policies, which would meet some minimum criteria. It was proposed to consider suspension of a domain name during a dispute, if a trademark owner objected to it within 30 days of its registration (U.S. DoC. NTIA, January 30, 1998, Appendix 2). Conversely, the White Paper abandoned the registry-centered approach of the Green Paper and supported a uniform mechanism for dispute resolution.

domain names… except by the designated trademark holder" (see U.S. DoC. NTIA. *The White Paper*, 1998).

Moreover, the U.S. government asked the WIPO to come up with recommendations for a UDRP, after a global consultative process, and suggest policies to protect famous trademarks in new gTLDs.[379]

The WIPO final report (April 30, 1999) outlined a dispute-resolution mechanism that enabled trademark owners to challenge domain-name registrations, when believed that their trademark rights were infringed. Independent dispute-resolution service providers, accredited by ICANN, would then discuss whether one of the following three allegations could be proved: identical or confusingly similar domain names to a mark in which the complainant has rights; the registrant has no rights or legitimate interest in the domain name; and the domain name has been registered and is being used in bad faith.

The Board and the Staff were so eager to be done with the controversial issue of trademark protection that they subjected the WIPO Report recommendations only to a public comment period, after which the ICANN policy was formulated by them.

The intention of the Staff, as described above, alarmed some ICANN observers.[380]

There was, though, another group of commentators, besides the trademark holders, urging ICANN to act quickly and adopt as many of the WIPO recommendations as possible right away. Those were the newly accredited registrars "anxious to have

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[379] As Mueller (2002) points out, "[f]oreign governments were… happy that Network Solutions' gTLDs would be open to CORE registrars and that an international organization, WIPO, had been given an important role in resolving the trademark problem" (175).

[380] In May 1999, some 86 participants in the pre-ICANN controversies sent a petition to ICANN and the U.S. DoC in protest of this "hasty adoption or… short circuiting the deliberative process that ICANN was created to foster" (*Other Archives,* Mueller, May 8, 1999).The signatories cautioned that the whole idea of ICANN would be undermined if the expectations of broad participation in the policy-making process were frustrated and ICANN adopted any of the WIPO recommendations in Berlin.

guidance on a uniform [dispute-resolution] policy", as it was reported at the Board meeting in Berlin (see BM 27 05 99). Significantly, the Management had acted on implementing the idea of a uniform dispute resolution policy before the WIPO Final Report was published. The requirement to adopt dispute-resolution policies had already been inserted into ICANN's "Registrar Accreditation Agreement", thus pre-empting any attempt to subject the WIPO recommendations on best registrar practices to a meaningful consensus-building process.

Not to alienate further the strong and consistent critics of ICANN, the Board referred three chapters of the WIPO Report to the newly recognized DNSO for recommendations.

The DNSO Names Council decided (June 12, 1999) to create a working group to review Chapter 3 of the WIPO recommendations regarding conflict resolution policy for domain names, labeled Working Group A (WG-A). WG-A was required, though, to produce a report in only three weeks, and, under such time-constraints it was clear that a true consensus-building process, which is usually time-consuming, could not be developed.[381]

During the WG-A's short life, there was no doubt that a kind of a uniform dispute-resolution process to protect the trademark owners' interests would be designed and implemented by ICANN. The actual goal was to do this in a legitimate way – by

[381] As Cohen, the Intellectual Property Constituency founder and the co-chair of WG-A, later pointed out to the ICANN Board, "the significant difficulties [of WG-A] were caused by the deadline we have been given which is arguably unreasonable and quite disproportionate to the magnitude of the task we have been charged with" (*WG-A,* Cohen, July 22, 1999). Auerbach criticized the process of policy-making in WG-A, as well: "The UDRP was rushed through ICANN almost from the minute it [ICANN] was formed. There was no room for anyone other than those who were extremely agile and well-funded to participate in the formation of that [policy]" (interview with the author, May 3, 2002).

including opposing or differing voices in the debate, which was otherwise controlled in discursive and procedural terms by the Management.

The significance of the WG-A discussion was compromised, in addition, by: 1/ the strategy of channeling the discussion into subgroups, each focused on a particular issue;[382] by dispersing voices and positions, this approach, in effect, prevented the participants from negotiating and influencing each other across the working group, which might have led to establishing points of consensus;[383] 2/ ICANN favoring particular views from the very beginning by endorsing the principle that a uniform dispute-resolution policy should be adopted by registrars in the *.com, .net*, and *.org* domains before a discussion was even initiated; 3/ incorporating, in advance, some of the WIPO recommendations for best practices for registrars in the "Statement of Registrar Accreditation Policy" (see BM 27 05 99); and 4/ encouraging the testbed registrars to work together as a group, and independently from the formal consensus-building process in the DNSO, "to formulate a model dispute resolution policy for voluntary adoption". As a result, there was not much left for WG-A to discuss, once the future policy formula had already been approved, and the development of an implementation mechanism had been assigned to a particular constituency.

Consequently, two of the first ICANN-accredited registrars - America Online (AOL) and Register.com - proposed a Model Dispute Resolution Policy for Voluntary Adoption, based on the WIPO Final Report (June 18, 1999). After soliciting comments

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[382] Cohen, for instance, insisted on defining the working group consensus on four questions, derived from the WIPO recommendations (see *WG-A,* July 7, 1999).

[383] The individual subgroups, consisting of four participants, resembled drafting committees. The Non-commercial Constituency, which opposed the WIPO recommendations, was disadvantaged by this configuration, because, at the time, it was still organizing itself, and was confined to a minority position in WG-A.

from other accredited registrars, in August 1999 they reported that approximately twenty registrars had agreed to adopt the model policy (BM 26 08 99).

In the WG-A Final Report (July 29, 1999), the principal recommendation was that "the WIPO uniform dispute-resolution process (UDRP) should be implemented on a mandatory basis in respect of disputes involving 'cybersquatting' or 'abusive/bad-faith' registrations". The recommendations, in addition, supported an expedient schedule for implementation of this policy. The registrar accreditation agreements required "voluntarily" submitting to the UDRP as a condition for a registrar accreditation.

3/ Famous Trademarks Protection Policy

While a universal dispute-resolution mechanism had to deal with real clashes of interests in the Internet domain-name space, the issue of protecting the so-called "famous trademarks" was raised on precautionary grounds. The trademark owners feared a universe of hundreds of new gTLDs, where such collisions with domain-name registrants as those that they had already encountered during the *.com* domain expansion in the mid-1990s, would proliferate. They were fighting to acquire the right of pre-emptive domain-name registration, but this was considered by non-commercial and end-user interests as threatening free speech and the right of free choice.

Following the Board's directive to review Chapter 4 of the WIPO Final Report: "The Problem of Notoriety: Famous and Well-known Marks", and come up with recommendations, the DNSO Names Council created Working Group B (WG-B) (July 13, 1999).

There was no deadline for the group, and, after the failure of WG A to conduct a truly consensus-building process (due to the limited timeframe allowed by the Board, among other reasons), the energy of the participating stakeholders poured into the other two working groups designing the future regulative order in the DNS – WG-B and WG-C.[384]

The discussion in WG-B, under the skilful leadership of the co-chair Michael Palage, a lawyer representing the Registrar Constituency's interests, was aimed at producing consensus recommendations. Initially an attempt was made (August 1999) to outline the differing stakeholder positions on the WIPO proposal for protecting trademarks in the domain-name space.

The focus of the discussion in WG-B, though, effectively shifted from the WIPO's proposal to the very necessity of granting a right of protection in the DNS to famous trademarks. As the opponents insisted, the UDRP would give famous trademark holders accurate and complete contact information for all registrants, and the right to identify and challenge any registration that is identical to or confusingly similar to their mark in a process that is much less expensive and faster than the courts.

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[384] In fact, what was addressed was only the gTLD portion of the DNS, which was controlled, in 1999, by NSI – a U.S.-based registry, and where property right conflicts emerged, involving, predominantly, North-American and European trademark owners and domain-name registrants. In this sense, the "famous trademarks" and "new gTLDs" policy areas were shaped by English-speaking participants from developed countries, who employed economic, legal, and social concepts often unfamiliar to the developing countries Internet users, and proposed solutions reflecting the Western mentality. The WG-B co-chair Palage noted in a message to the group's mailing list: "As Amadeu [Abril i Abril – a Spanish lawyer, who represented the DNSO/Registrar Constituency on the Board] always reminds us fair use and the First Amendment have little meaning outside the U.S." (*WG-B.* Palage, November 10, 1999).

Realizing the irreconcilability of the two opposing positions, the co-chair Michael Palage stepped in and asked the participants to vote[385] on "Question 0": should there be any safeguards established to protect famous trademark owners and consumers in connection with the registration of domains (see *WG-B.* Palage, September 29, 1999). Consensus was reached on the statement that "some types of safeguards need to be implemented to protect famous trademark owners and the consuming public".

Arguably, WG-B was dominated by the large U.S. telecommunications and Internet service providers, such as AT&T and AOL. The intensity of this domination increased after ICANN's first annual meeting in November 1999, when around 30 more multi-national corporations and intellectual property attorneys joined the pro-protection camp. As a result, a number of participants in the WG-B discussion began questioning the ability of the group to arrive at particular consensus recommendations. To overcome the stalemate caused by the imbalance of participation, Palage asked the two liaison persons to influence the members of their respective constituencies (the Business and the Non-commercial constituencies) and to negotiate mutually acceptable proposals. The result was a co-authored paper "Common Ground", arguing that the intellectual property advocates and the freedom advocates had, in fact, common objectives: to create clarity for the net user by a controlled and responsible growth of top-level domain names (*WG-B.* Sheppard, February 9, 2000). The rhetoric, though, turned out to be ineffective, which suggested that other strategies for negotiation were needed.

At the Cairo meeting (March 2000), the first ICANN inter-constituency alliance emerged between the Registrar and the Intellectual Property constituencies. This marked

[385] In a later message, Palage explained: "Learning from working group A's criticisms, I decided that it was best to start with a clean slate and put to vote whether safeguards were needed" (*WG-B.* Palage, November 14, 1999).

a shift from the open working-group consensus-seeking discussions to negotiations at inter-constituency private meetings. In fact, this proved to be an effective strategy for influencing a particular constituency's position on the contentious issues. The Registrar Constituency embraced the trademark owners' agenda and declared that it was "willing to back" the creation of a famous marks list by a qualified administrative panel, such as WIPO, provided that it would be used only in connection with a voluntary sunrise period[386], and not in connection with any filtering mechanism.

The Intellectual Property Constituency's position evolved, as well, as a result of the negotiations with the other stakeholders. From, originally, adopting the basic principles set forth in Chapter 4 of the WIPO report and advocating the creation of a famous trademark list, they, consequently, accepted the registrars' proposal to incorporate a sunrise period into the rollout of new TLDs (see *WG-B.* Palage, April 17, 2000).

The universal employment of the sunrise concept was opposed by the Non-commercial Constituency on the basis that it embedded a permanent bias in favor of existing businesses, and it was not suitable for certain non-commercial domains. As an alternative solution, that constituency proposed the creation of a particular gTLD for

[386] The WG-B co-chair Palage was the most vocal proponent of the "sunrise" domain-name registration concept, which he developed in his position paper (see *WG-B.* Palage, December 9, 1999). Apparently, he believed that this concept provided a constructive alternative to the rigid opposing views, and, thus, it would be able to move the discussion in the direction of reaching consensus in the group. Palage was criticized, though, by some participants for imposing his biased view on the Registrar Constituency and presenting it as the group's consensus. As he readily acknowledged, "[i]n addition to my duties as Chair of this Working Group, I am also secretariat of the Registrar Constituency. Needless to say the registrars have a vested interest in this Working Group. Therefore, the registrars have taken an active role in the process similar to their role in drafting of the UDRP. To my knowledge there is nothing preventing constituencies from talking to other constituencies about ICANN policies that directly impact them" (*WG-B.* Palage, March 26, 2000).

famous marks (*.fame*, for instance), which would be branded as "the place to be in e-commerce".

In the WG-B report to the Names Council, the following consensus points were presented: 1/ there did not appear to be "the need for the creation of a universally famous marks list", and 2/ there appeared to be "a consensus that protection afforded to trademark owners will depend upon the type of top-level domains" (see *WG-B.* April 17, 2000).

The co-chair's claim that agreement had been reached on the sunrise proposal, though, was vigorously opposed by the Non-commercial Constituency participants, who accused Palage of including misleading statements in the report.

After a three-week public comment period, the WG-B report was discussed at the Names Council meeting (May 19, 2000), and presented to the Board as consensus recommendations. In a resolution following the WG-B and WG-C reports, the Board required that the potential applicants for new gTLDs include in their proposals mechanisms that would provide protection for intellectual property rights (see BM 16 07 00).

4/ New gTLDs Selection Policy: expanding the domain-name space

Along with the dispute-resolution policy and famous trademark-protection mechanism, the introduction of a limited number of new gTLDs was one of the key WIPO recommendations to ICANN (April 30, 1999).

Among the existing three gTLDs open for registration at the time, only *.com* was semantically linked to businesses. The cybersquatting practices in that domain threatened

trademark owners with the exhaustion of the text strings corresponding to their brand names, and, consequently, with cost-and-time consuming court litigations. The most logical way out of this situation was to expand the gTLD space. But trademark owners were against it because of the fear that they would have to police larger cyber-territories for potential "bad faith" registrations, which would enormously increase the cost for them.

The trademark owners wanted instead to impose restraints on the domain name space expansion until a uniform dispute-resolution process was installed at the entrance point of the Internet – the registration of domain names. What their opponents advocated (and these were not the cybersquatters targeted via the envisioned dispute-resolution system) was not to restrict the growth of the Internet DNS by embedding the business interests in centrally controlled mechanisms, but to allow the medium to mature according to its technical potential and users' demand.

Because of the controversial nature of the issue, the policy-building and implementation processes went on for approximately 19 months (from April 30, 1999 to November 16, 2000). In some respects, the ICANN critics' frustration with this policy area stemmed from this prolonged decision-making process, perceived as being manipulated by the champions of the trademark and intellectual property interests.

Working Group C on New gTLDs was created by the DNSO Names Council as an online consensus-building forum in mid-June 1999. By the end of June 1999, the group comprised approximately 30 participants. Two months later, the number had grown to 70, and in November 1999, there were 90 representatives of the DNSO constituencies on the mailing list. Only 24 of them, though, took part in discussing the

relevant issues; the rest simply "observed" its development (see *DNSO GA.* November 2, 1999).

The WG-C Interim Report was submitted to the Names Council in November 1999. It demonstrated both a very limited consensus on the need for new gTLDs to be introduced, and a sharp division on the pace and the number of new domains to be introduced. Thus, the consensus points suggested that between six to ten new gTLDs should be introduced initially with a testbed period.

At the ICANN meeting in Cairo (March 8, 2000), the DNSO Names Council presented to the Board its report on the New gTLDs, which was based on the WG-C Consensus Report, written by Jonathan Weinberg, the WG-C Chair. The consensus reached on two items was underscored: 1/ there should be new gTLDs; and 2/ ICANN should deploy 6 to 10 new gTLDs and then have an evaluation period. As for the issues on which no consensus had been reached, they were summarized as follows: 1/ what the process for ICANN to select new gTLD registries should be; 2/ whether new gTLDs must be chartered; 3/ whether they should be specific or general; and 4/ what qualifications any new registry should have to have (NCM 08 03 00).

The WG-C consensus points, though, did not enjoy the support of all Names Council members. A straw poll taken on April 18, 2000, on the two consensus items demonstrated the divisions in the Council. On the first question (should there be new gTLDs), thirteen of the sixteen members present at the meeting answered "yes". On the second question (should ICANN deploy 6 to 10 new gTLDs), though, only five members approved even that limited number, while nine disagreed, and those were members of the business, ISPs, registrars and intellectual-property communities. The Names Council

interpreted the failed vote as showing how "[s[ometimes Working Groups are dominated by large talkers, not representing [the] point of view of the Constituencies". Further, it was agreed that the Names Council's role was to ensure the representation of the stakeholders and provide recommendations based on it. Accordingly, the role of the WGs was simply "to gather public opinions and thoughts", while the Names Council members "should discuss among themselves, then combine both, and later deliver to the board" (NCM 18 04 00).

The above interpretation of the respective roles of a working group and the Names Council indicated the ongoing power struggle in the DNSO to limit the decision-making capacity of the open-participation working-group format and endow the structurally-unbalanced Names Council with the right of veto on a working-group's recommendations to the Board.

Striving for expediency, and presented with rather general consensus points by the DNSO, at the Yokohama meeting (July 13 - 17, 2000), the Management took the implementation of the New gTLDs Policy into its hands. Louis Touton, ICANN's General Counsel, stated that the Names Council would not play any role in the selection process. It was up to the Election Committee, created by the Staff, to recommend to the Board which applications should be accepted.

The ultimate implication of the above events was two-fold. On the one hand, the gradual shift in the distribution of power – from the Board to the Staff - was completed. The conflict over ICANN's dual identity – efficient policy making vs. legitimate policy decisions - was resolved by attributing more authority to the Management. Frustrated with the slow progress (nineteen months were spent on the selection of only seven new

gTLDs), some stakeholders were glad to delegate more responsibilities to the full-time Staff. On the other hand, the open-format working groups were replaced by limited-membership discussion groups (task forces, advisory committees), where, usually, the Names Council appointed the participants in the groups.

On November 16, 2000, the Board announced the names of the new gTLDs[387] and the beginning of negotiations for agreements with registry sponsors and operators. The negotiations were completed by the beginning of March 2001, but some Board members were not happy with the results, because 1/ there was no clear ownership separation between a registry operator and a registrar, and 2/ the DNSO was not involved in the process of negotiating the contracts.

The first sponsored gTLDs were ready for business in September 2001 (see BM 10 09 01).

5/ Internationalized Domain Names Policy

Developing a position on deploying multilingual domain names was not among the tasks mandated to ICANN by the DoC. Consequently, it took the Corporation almost a year (from August 2000 to March 2001) to realize the public-interest aspects of the issue and include it in the Board's agenda.[388] The pressure to get involved came from the

[387] The selection of seven proponents, sponsoring one gTLD each, from a pool of more than forty applications, prompted accusations of arbitrariness. Some of the rejections were interpreted later as proof of ICANN becoming an overly controlling body. In the Consumer Project on Technology's comments on ICANN evolution and reform campaign, authored by James Love, it was noted that "ICANN's sense of power and control is so large that it rejected proposals by the United Nations to run a *.un* registry and the World Health Organization to run a *.health* registry. The International Confederation of Free Trade Unions (ICFRU) was rejected in its bid to run a *.union* registry. Some organizations that did obtain the few ICANN approved new gTLDs reported having spent considerable resources for well connected lobbyists, consultants and lawyers to obtain ICANN's approval" (*ERC,* Love, April 30, 2002).

[388] Internationalized Domain Names (IDNs) are represented by local language characters (non-ASCII characters), which have to be registered with certified ICANN-accredited registrars. The registrar converts

same stakeholders, who, a couple of years earlier, opposed the expansion of the domain-name space with new gTLDs, and for the same reasons. The DNSO Business Constituency members, for instance, were concerned about the potential for consumer confusion in the process of character translation, and the retrieval of WHOIS data in other languages. The Intellectual Property advocates brought up the possibility of cybersquatting and the legal implications of the existing testbeds. The Internet technical elite, as represented by the IETF, was concerned that the pioneering efforts of VeriSign (formerly, NSI[389]) in implementing the registration of non-ASCII charters domain names in testbeds would threaten the development of open-non-proprietary standards. Upon the insistence of its Asian-government representatives, the GAC reported that it would form a working group on IDNs, as well.

Ultimately, ICANN approached the issue rather cautiously by, first, creating an information-gathering working group (March 2001) which was to undertake no substantive decision-making. At this stage, ICANN's role was seen as only monitoring the implementation of non-English language character sets by VeriSign. The four-member working group conducted a survey on the technical and policy aspects of the IDNs, and on the existing services. This was designed as a way to ascertain the Internet community's attitude towards ICANN's role in this policy area, yet the resulting recommendations to the Board were based on a rather limited response. As the at-large membership concept had not yet matured in ICANN, millions of potential users of IDNs

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the names into a sequence of characters, which are supported by the DNS (a combination of ASCII characters, including A – Z, 0 – 9, and the hyphen "-", based on the English writing system), using an ASCII compatible encoding (ACE). The registration process includes placing a unique IDN in a registry database. End users are able to use IDNs to navigate websites, and, in the future, to address e-mails (see NSI, "How IDNs Work").

[389] In 2000, Network Solutions was acquired by VeriSign, Inc. In 2003, VeriSign sold its Web-related businesses (e-mail, web sites, hosting and Web presence) but kept the registry database of *.com* and *.net* TLDs and web site authentication service, renaming it VeriSign Naming and Directory Services.

around the world could not make their voices heard, and the working group report lacked their perspective.

Simultaneously, a multitude of stakeholders were exerting pressure on ICANN to get involved in the regulation of the IDN registration-policy aspects.[390] Although, primarily, a reaction to the aggressive market approach of VeriSign, this was, as well, a demonstration of a higher level of stakeholder confidence (especially, for non-English speaking participants) after being involved in the previous policy-setting cycle in ICANN.

The prolonged information-gathering stage in ICANN paralleled the rather delayed standard-setting-by-consensus one in the IETF, because of the enormous complexity of the task. The time (from September 2001 to October 2002) was used by ICANN to establish its position on key IDN policy issues. The then-newly created IDN Committee, consisting of registrars, registry operators, and technical experts, produced a series of position papers leading to two fundamental recommendations: 1/ ICANN's approach to the IDN policy issues should continue to be conservative, which meant keeping Internet stability and interoperability as the first priority; and 2/ there should be harmonization of the regulative procedures for ASCII and non-ASCII domain-name spaces, which translated into bringing the new practices related to the registration and

[390] When asked whether there have been any failures in ICANN's policy making, Antonio Harris, an Argentinean representing the ISP and Connectivity Providers Constituency on the Names Council, at the time, brought up the IDN issue: "One thing, which I cannot call a failure, but which has been delayed due to technical resolutions, is having multilingual domain names, an item that has been heavily insisted upon by countries like China, Korea, Japan – people from the countries, which do not use the ASCII characters. They want internationalized domain names, and in several meetings we've had reports on this from technical bodies, but it does not seem to have a good solution to this" (interview with the author, April 22, 2002).

resolution of IDNs into the regulative regime for ccTLDs and gTLDs that had been established by ICANN.

On this basis, the Board defined ICANN's role in the IDN area as simply setting guidelines for the implementation of IDNs, and allowing the individual registries to make policy decisions for their own practices (March 2003). In its *Sixth Status Report to the DoC* ICANN argued that the corporation's role in IDN implementation should be limited. ICANN had agreements with the major gTLD registries, and these required ICANN's authorization before a registry could begin accepting registrations of IDNs. Hence, the risk of user confusion and new opportunities for cybersquatting could be reduced by the adoption of registry-level policies (see *ICANN Status Reports,* March 31, 2003).

Overall, despite the official recognition of the multitude of policy issues that emerged with the implementation of the IDNs, ICANN preferred to stay on the sidelines for most of the three years of discussion on the IDN issue. It has to be recognized that, in the first half of that time-period (from August 2000 to September 2001), information-gathering was a necessary stage due to the novelty and technical complexity of the issue. Yet, the lack of representation of potential IDN users from around the world, because of ICANN's incapability of developing consensus on the At-large Membership policy, deprived the discussion of an important perspective on ICANN's scope of involvement in IDN implementation.

Unfortunately, the second half of that time-period (from September 2001 to October 2003) was characterized by the same handicap, because of the initiation of the reform process in ICANN.

Ultimately, ICANN decided to limit its role to developing guidelines for the implementation of IDNs. In its *Seventh Status Report to DoC* ICANN explained that Draft Guidelines were developed on the premise that ICANN should take a light-handed approach (see *ICANN Status Reports,* June 30, 2003). Nevertheless, compliance with certain requirements was established as a condition for authorizing a registry to enrol IDNs.

In all this limited decision-making in the IDN area, ICANN relied on small-scale discussion groups, comprised of stakeholders from the supply and development side of the domain-name registration industry only. The broad user community was not included in the discussions, except at the Public Forums at ICANN's quarterly meetings, and in the online notice-and-comment series. The end users, themselves, were, perhaps, intimidated by the technical complexity of the area, with the noticeable exception of a few voices from the Non-commercial Constituency.

6/ DNS Security and Stability Policy

Despite the key significance that the DNS security issues had for the proper functioning of the Internet globally, they gained momentum in ICANN only after the September 11, 2001 terrorist attack against the U.S. It had been a shared belief among the technical cadre that the Internet was a robust network due to its original architectural principles of distributiveness and redundancy.

Overall, ICANN assumed a reactive stance on the DNS security issues. Before the Fall of 2001, the only security issue discussed in ICANN had been the need for correct

registration data in the publicly available WHOIS database.[391] Yet, this was not a concern with the performance of the global network, but with the protection of the property rights of trademark and intellectual property owners.

ICANN responded to the events of 2001 by dedicating its annual meeting to DNS security issues (November 13 – 14, 2001). In fact, the meeting marked the single most significant initiative on DNS security in ICANN during its formative stage. Besides its informative purpose (to improve the knowledge base and heighten awareness), the meeting aimed at determining what ICANN's role in assessing and improving DNS security should be.

On the latter, it was suggested by the participating security experts that ICANN should have responsibility in three areas (see *SSAC.* January 4, 2002): 1/ IP address allocation concerning the quality of the assignment data; 2/ DNS root name server management, where improvements has to be coordinated among a wide range of entities; and 3/ DNS management. It was recommended that, in order to secure the whole system (from name servers to resolvers, name and address registries, accredited registrars), ICANN should develop the requirements for operating systems or the definition of protocols, "in consultation with its community of registries, registrars, root server operators, and users".

At the meeting, this policy framework enjoyed broad agreement, and later it was assigned as a major task to the President's Standing Committee on Security and Stability, which was created on the basis of a resolution approved at the November 2001's meeting

[391] WHOIS is an Internet directory service (based on a database) that returns ownership information about second-level domains. Information often includes the name and address of the registrant, administrative contact, technical contact, billing contact, creation date, expiration date, and domain servers.

(see *SSAC*), and the next year was renamed the Security and Stability Advisory Committee (SSAC).

As Auerbach noted at the Board meeting on November 15, 2001, the decision to create such a committee had not, itself, been the subject of public comment, but, in principle, ICANN approached the security-policy area without involving users (entities and individuals). The twenty-member SSAC consisted exclusively of experts, representatives of the RIRs, registries, registrars, and ISPs. In addition, it was only in mid-2002, that, following a suggestion to the Committee that it should have some way of accepting inputs, the SSAC set up an email address for comments to be sent in. It was considered satisfactory, as well, to inform ICANN participants via periodic public presentations.

After 2001, as happened with some other policy issues in ICANN, the security-policy task lost its priority status because of the ongoing reform process. More importantly, the SSAC exhibited a relaxed attitude towards the need for policy intervention, when technological solutions were required.[392]

In this light, it is not surprising that ICANN's efforts in the DNS security area have never produced a security framework for Internet naming and address allocation services that defined the key focus areas, and identified where the responsibilities for

[392] As the SSAC Chair Dr. Stephen Crocker explained, "technical people, typically, have quite a lot of faith in the utility and value of being technically well-grounded. It's a natural part of our shared culture that if you get to the bottom of things technically, then you can sort out the policy issues more effectively. And if not, then a lot of policy issues that might attract attention or get a lot of debate will turn out at the end to be wrong or misguided or ill-informed. But that's just a standard prejudice of the technically grounded people" (interview with the author, July 20, 2002).

each area lie. Thus, although it was considered the worst "surprise" scenario if all root servers were suddenly shut down, this was seen as a highly unlike scenario.[393]

This optimistic stance was challenged in October 2002, when it was reported by some sources that nine of the 13 root servers were briefly crippled by a denial of service attack[394], and the responsiveness and access to the Net were reduced by six percent (see *Journalistic Articles,* Alberti, 2002). ICANN was criticized for attempting "to spin the outcome as a positive endorsement of its leadership", for not being prepared for a more sophisticated attack with adequate redundancy and safeguards in place. Overall, ICANN was blamed for leaving the Internet's critical domain name services vulnerable to even fairly simple attacks.

Following the attack, Crocker was forced to acknowledge in his presentation at the Public Forum in Shanghai (October 30, 2002) that the attack was "substantial and serious", but, he added, "the damage to the end users was minimal or nonexistent" (see PF 30 10 02).[395]

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[393] Crocker considered this "a very big if", because "there are 13 separate root servers, and each of them has multiple machines, and they are distributed all over the world and are run by different sets of people, so I don't think it's so easy to take all of them down. But, if you did, what would be the impact on the Internet, how soon would it be felt? Would it bring the Internet to a stop right away or would it be hardly noticeable? The argument that it would be hardly noticeable is quite reasonable, because when you make a name reference - *.org, .com,* or *.net,* you go up to the TLD server for that and you don't need to go to a root server, unless you don't know where *.com* table of the domain server is. But almost everybody has that cached for a very long time. So it can be argued that it might be a couple a days before anybody would be seriously affected. And that's a very long time – you can set the [damaged] server on line very rapidly" (interview with the author, July 20, 2002).

[394] A denial of service attack is defined as "an incident in which a user or organization is deprived of the services of a resource they would normally expect to have" usually because of lost network connectivity (see http://whatis.techtarget.com/definition/0,289893,sid9_gci213591,00.html).

[395] Two years later, when commenting on the same case, Patrick Morrissey, the Deputy Director of Law Enforcement and Intelligence with the U.S. Secret Service, stated: "[I]n 2001 it was widely reported that attackers disabled nine of 13 root servers. Contrary to popular belief, only one root name server failed during those attacks, and it only failed for a short time over a 45 minute period. The 'nine of 13 failed' statement… simply was an inaccurate monitoring statement" (Morrissey, September 30, 2004).

Unchallenged in its homogeneous membership mentality, the SSAC lacked, apparently, the incentives that an inclusive consensus process would have brought in to produce the required policy framework.[396] Despite Crocker's hopes that by the Shanghai's meeting the Committee would be able to publish a description of the DNS security vulnerabilities, security architecture, and a measurement framework, progress had been very slow. Arguably, the SSAC discussions were not marked with the sense of urgency, because, as Crocker stated, he did not think that the DNS presented significant risk for the stability of the Internet: "There is a bunch of specific technical issues to take into [consideration], but, in general, it [the DNS] is in good shape and needs to be improved. It [the DNS] is centralized, in a respect, but there is quite a lot of distributedness in it, as well, so it would be hard to disrupt the entire system" (interview with the author, July 20, 2002).

In the acquired manner of reaction to events, and as a recognition of the ineffective policy approach, in Shanghai (October 28 – 31, 2002) the SSAC announced that it would focus on individual threats and recommendations for those threats, and then would piece them together into a large framework.

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[396] The following musings, provided by Karl Auerbach, are an illustration of the suggested effect that the multistakeholder involvement on the security issue would have had: "There is definitely a security issue with the DNS. It's more of not so much protective security as much as if something should damage the DNS, how we would pick up the pieces and put it back together. It's not a hard question. ICANN has totally humbled that one. It has assembled a panel of experts who understand technical security in terms of keeping bad packets out of computers, but don't really understand putting back the pieces when things crumble.... ICANN doesn't seem to recognize that there are a lot of things you can do to protect the DNS of the Internet. The steps are so easy – just writing off some backups and get them widely distributed in the hands of lots of people. It's cheap – just blasting CD ROMs and sending them to the people. They don't do that! The inability to do even the easy stuff has been very disappointing" (interview with the author, May 3, 2002).

7.3. Observations and conclusions

From the vantage point of 2004, Paul Twomey, the ICANN President and CEO, named six substantive policies as being ICANN's main achievements: 1/ market competition for gTLDs; 2/ choice of new gTLDs; 3/ the IDNs; 4/ the UDRP; 5/ the Redemption Grace Period; and 6/ streamlined domain-name transfers (see Twomey, September 30, 2004).

This statement is in stark contrast to the assessment provided two years earlier by a number of prominent ICANN officials and participants who were interviewed for the present project. Most of them pointed at only one of the above-mentioned policy items as constituting a success – namely, the UDRP.[397] On the other hand, although praised by ICANN officials (Dyson, Roberts, Lynn, Cerf), the New gTLDs policy was considered by some interviewees as "an embarrassing failure" (Mueller) because of the way the selection process was conducted by ICANN[398], and because "it did not address in a significant way the expansion of competition" (Philip Sheppard, Business Constituency and the Names Council Chair at the time). Significantly, for those interviewed (both ICANN officials and constituency representatives), the sense of failure was linked to 1/ the creation of an At-large Membership and its representation on the Board; and 2/

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[397] For instance, for the IP lawyer Cohen, this policy was "an outstanding success". Indeed, by 2004, this policy mechanism had resolved more than 5,000 disputes over the rights to domain names and proven to be efficient and cost effective (see Twomey, September 30, 2004). Even some outspoken opponents of the WIPO recommendations acknowledged that "the UDRP set up a successfully functioning system of resolving domain name disputes" (Mueller), and "it, probably, stands up as the ICANN single most significant creation" (Auerbach).

[398] Similarly, while bringing the perspective of the Asian participants, Park (Non-commercial Constituency) commented: "If you look at the applicants [for new gTLDs], most of them were from the U.S.A., there were some people from Europe, and those were who had had an earlier experience, but the rest of the world was just watching the show. And only as an observer, a guest, the show seemed to be sort of manipulated by somebody else" (interview with the author, May 3, 2002).

making the DNSO more effective in initiating policy topics and generating policy recommendations.

The above example of differing assessments of what constitutes success is illustrative of the collaborative dynamics in ICANN's formative years. While the Management measured success with the number of developed policies, 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.

In the last three chapters, ICANN's practices in self-governance were dissected along the lines of legitimization, model implementation, and substantive policy creation efforts. In all these areas, the attempts to materialize the multistakeholder consensus model were compromised by the lack of understanding of the political aspects of the technological issues.

Conceiving of themselves as custodian of the global Internet, the technical experts were in favour of a trusteeship corporation and a centralized top-down process of policy making. Subscribing to the efficiency approach, they acclaimed the legacy of the informal consensus-reaching regime. Yet, for them, the limited technical-management mandate of ICANN required the participation of only "informed" stakeholders. Interestingly, as discussed in the next chapter, this requirement concerned only the at-large Internet user constituency and not the corporate-users constituency.

As a result, by the end of 2002, ICANN was redefined as a public-private corporation and the experimental stage of creating a private regime to govern a global resource in the public interest came to a conclusion.

Chapter 8. Transition to ICANN 2.0: in search of ICANN's identity

ICANN 2.0 looks like a deal between (some) industries
and (some) governments which sidelines the global Internet users...
[O]ne might reason by asking to what extent
this new muscular Board represents anything more
than the codification of ICANN's prior practices.

A. Michael Froomkin
"ICANN 2.0: Meet the New Boss" (2003)

By the fall of 2001, the need for "reforming" ICANN had been loudly expressed by most of ICANN's stakeholders, who were virtually united by the feeling of frustration with the way the corporation was functioning. In view of the considerable community concern, the Board, at ICANN's 2001 Annual Meeting, created a Committee on Restructuring, appointed its members, and directed ICANN's President to come up with recommendations for "how best to reaffirm and clarify the nature and scope of ICANN's limited mission" (see BM 15 11 01).

This chapter focuses on the process of redefining ICANN's mandate and organizational structure, and, thus, departing significantly from the original multistakeholder collaborative model.

There were differing views on the reasons for reforming ICANN and the methods for doing so. The champions of an all-inclusive ICANN believed that the original

concept, of a private corporation to manage the Internet DNS in the public interest on a consensus basis, constituted the yardstick for assessing the corporation's performance. ICANN needed to be reformed, even reconstructed, or abandoned as an entity, they claimed, if Internet governance was both to be true to its open-source origin and to be able to sustain the network's embedded democratic potential.

To the contrary, the Staff and most of the Board members, along with the providers of services and the Intellectual Property Constituency, were all frustrated with the time-consuming policymaking process within ICANN, which was perceived as infringing commercial interests.

As noted before, there was another important reason to strive for a speedy and more effective policymaking process - the transition to a private DNS management was made conditional, by the U.S. DoC, on completing an ambitious agenda of substantive policy issues and bringing the RIR and ccTLD operators into the emerging regulatory regime. Without the support of those important infrastructure providers, ICANN would lose its image as a globally inclusive stakeholder entity, which constituted the sole source of its legitimacy.

In short, the shared feeling of frustration in ICANN was not based on common reasoning, did not reflect common understanding of ICANN's priorities and mandate, and was not aimed, consequently, at resolving identical problems. The bottom line was that defining ICANN's identity constituted an unresolved issue in the first four years. Although tensions among the stakeholders often transpired in the context of resolving particular policy items, the fundamental differences were always expressed in relation to conceptualizing ICANN's identity - mandate, authority, and legitimacy.

8.1. Unfolding the Evolution and Reform campaign

Indeed, the controversies over the ICANN representative structure (i.e. At-large Membership, election of at-large directors on the Board, creation of a separate ccTLD supporting organization, etc.) and the lack of a true consensus process, leading often to arbitrary decisions (i.e. the selection of seven new gTLDs), suggested that the corporation was in a deep identity and legitimacy crisis. In the U.S. House and Senate, there were calls for holding new hearings on ICANN. On the ICANN Board, itself, the dissident directors challenged each decision, published online their own diaries with information about behind the curtains deals and alliances. Karl Auerbach, one of the five at-large directors elected in the experimental online global elections in October 2000, filed a lawsuit against the Corporation (see Chapter 6.2). In addition, many of the approximately four hundred ICANN volunteers gradually withdrew from active participation in the ICANN debates[399], because they had been discouraged by the Staff/Board's attitude of disregard for their contributions. Most importantly, the ccTLD operators threatened to separate from the corporation, as their request for stronger presence in ICANN's structure had been ignored.[400]

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[399] Pointing to the eroding degree of participation in the ICANN process, the Center for Democracy and Technology (CDT) explained in its comments to the Committee on ICANN Evolution and Reform: "There has been a persistent and troubling drop-off in the number and categories of dedicated participants in the ICANN process. Fewer and fewer groups have marshaled the resources necessary to maintain an active presence in the ICANN space – the result of a perceived diminishment in the returns that participation in the ICANN process brings. Moreover, ICANN continues to lack any robust participation mechanism for end users. As the diversity of participants diminishes, ICANN's discussions are likely to become less and less reflective of the community's needs, with potentially grave consequences for the Internet's future." (*Comments Online,* CDT, May 3, 2002).

[400] As Kathleen Fuller stated, "[t]oday, ICANN is facing a virtual revolt. Domain name registrars outside the US are protesting bills sent by ICANN (which help finance approximately 1/3 of ICANN's $5 million budget), claiming they want either better representation or the ability to breakaway from ICANN and set up their own networks" (Fuller, 2001).

Facing the danger of a disintegrating organization, ICANN's President Stuart Lynn[401] issued a report entitled "ICANN – the Case for Reform" (February 24, 2002)[402], where he proposed a strategy of sweeping changes in the corporation's structure and process. The ICANN President recommended that the corporation should undergo "significant evolutionary reforms"[403] and find a new identity through the "public-private partnership" formula.

Lynn's Report was in striking contrast to the always positive-sounding annual status reports of ICANN to the DoC. In the President's assessment, ICANN "has not become the effective steward of the global Internet's naming and address allocation systems as conceived by its founders" and "it has fallen short of hopes and expectations". Without explicitly calling the ICANN experiment a failure[404], Lynn conveyed the urgent need for a "deep, meaningful, structural reform" as he concluded that "ICANN will... either be reformed or irrelevant within the next several months".

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[401] Stuart Lynn was the second ICANN President and CEO, holding the position from March 2001 to March 2003 (see *Other Archives,* ICANN. "M. Stuart Lynn"). A retired Associate Vice President for Information Resources and Communications at the University of California, he combined expertise in both consensus-building and information technology, which, in his view, was the reason ICANN asked him to replace Michel Roberts. Lynn saw his mission as helping ICANN "to move to the next level" of achieving stability, "as almost a form of public service", although he was "extremely impressed by how far ICANN had really come during its formation stage, which was a very, very difficult stage, how much had been accomplished by the Board of my predecessor" (interview with Lynn, April 19, 2002). It can be suggested, then, that Lynn's Proposal for Reform, prompted by the deepening identity crisis in 2001, constituted a personal mission-enactment document. It was aimed at stabilizing the corporation by reconstructing and redefining ICANN, in order to absorb some of the strongest and most persistent pressures on the organization, coming from key stakeholders – national governments, ccTLD and RIR operators.

[402] See *Milestone Documents,* Lynn, February 24, 2002.

[403] Arguably, the adjective "evolutionary" was systematically applied to the reform campaign in ICANN (i.e. the Evolution and Reform Committee) in order to convey the Staff's intent not to depart too far from the original U.S. DoC's structural and functional corporative model. This strategy is understandable in view of the fact that amidst the reform actions, for instance, ICANN leaders had to undergo one more hearing before the U.S. Senate Committee on Commerce, Science and Transportation, focused on ICANN Governance (see U.S. Senate Committee on Commerce, Science and Transportation, June 12, 2002). For ICANN critics, though, as the quote at the beginning of this chapter suggests, the ultimate result of the reform was simply codifying those practices that, in the first place, had been previously noticed as departing from the aspired bottom-up, inclusive, consensus process. Hence the conclusion that ICANN 2.0 constituted a betrayal of the multitude of global Internet users.

[404] Nonetheless, in a proverbial fashion, Lynn stated that "[p]rocess that prevents effectiveness is a failure".

In Lynn's Proposal[405], the argument went as follows: ICANN was, first, "overburdened with process and, at the same time, underfunded and understaffed", and, second, it had not been successful in establishing formalized, contractual relations with many important stakeholder groups; hence the inference that the original concept of a purely private sector body, based on consensus and consent, had been shown to be "impractical": "With three years experience, it is clear that model is simply not workable. It is not workable because it leaves ICANN isolated from the real-world institutions – governments - whose backing and support are essential for any effective global coordinating body to accomplish its assigned tasks".

"The stakes are high", Lynn warned. "Absent a substantial increase in the efforts of governments to support and encourage the continued development of the private sector approach, I do not believe that ICANN will be able to complete the transition from U.S.

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[405] *ICANN – the Case of Reform* has been often referred to as "Lynn's Proposal", because of the author's strong presence in the text: "I have come to the conclusion that…", "I believe that…", "I do not believe that…", "I am now convinced that", "it seems to me", "in my view", etc. Yet, as Andy Mueller-Maguhn, one of the five at-large directors in ICANN, reported five days prior to the announcement of Lynn's Proposal, the plan for reform had been discussed, behind closed doors, in the European Commission (Department for Information Society): "I just got a call from a source in the European Commission (Department for Information Society). Joe Sims [the ICANN Counsel] was today in Brussels for some kind of a closed door meeting with Christopher Wilkinson [an adviser in the Directorate General Information Society, European Commission; currently, the vice-president of the ICANN GAC on which he represents the European Commission] and some other people of the European Commission… Sims presented plans for a complete restructuring of the ICANN board, without the at large. If I understood correct[ly] with governmental representatives in the board and with complete[ly] different set of ASO, PSO and parts of the DNSO. I just reached Christopher Wilkinson on the phone who seemed astonished about my knowledge on that Sims had been there. I asked for details of what Sims presented and only got the sentence from Wilkinson, that 'he is not sure if Sims presented this as a position of the board of his own'. To his understanding, this will be presented to the board at Saturday and he told me, that he would be more happy if I could get the details from the board. Short: he told me to piss off and not disturb the conspiracy. Shocked, A." (*Journalistic Articles,* Mueller-Maguhn, February 19, 2002). Significantly, in the interview with the author, conducted only four days prior to the announcement of the Proposal, Roberts, in a much similar way reasoned the need for a reform in ICANN. The impression that the senior ICANN Staff was responsible for the presented plan for a reform was conveyed again by Karl Auerbach, in the interview, conducted on May 3, 2002: "Stuart Lynn's Plan for a Reform came out from nowhere but Stuart Lynn and Joe Sims. They declared it".

government control to global private sector management of the DNS and related functions of the Internet".

From there, Lynn proceeded to design a reform project that "must replace ICANN's unstable institutional foundations with an effective public-private partnership, rooted in the private sector but with the active backing and participation of national governments". By elevating the national governments' status in ICANN to one of the four "essential participants" groups in the consensus process[406], Lynn attempted to resolve two major problems in ICANN: 1/ overcoming the legitimacy crisis of the corporation, and 2/ filling up ICANN's coffers by ensuring a larger and permanent flow of funding. He related the former to the unique role that governments play in representing the broad public interests of their populations. They "certainly stake a better claim to truly reflect the public interest than a few thousands of self-selected voters scattered around the world", he concluded. In light of this argument, the position of some that "because ICANN is not itself a governmental organization, it should build its own government-like institutional foundations on a global scale" seemed unreasonable: "National government participation... is... essential to end the Sisyphean effort of searching for a workable public accountability mechanism for ICANN".

As for the latter, Lynn stated that a fully funded ICANN would require an operating budget of 300-500 percent of its current budget level, which escalated to US$ 25 million per year for the following three years.

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[406] The other "essential participants in an effective ICANN", according to Lynn, were the various infrastructure providers of the Internet, major users, and the relevant technical community. Note the use of the term "major users" instead of "Internet users", in general, which, effectively, excluded the individual users and suggested the special importance of the big businesses, governments, the academia, etc.

Lynn's Proposal is a watershed document in ICANN's history. It spelled out the Management-espoused philosophy of efficiency, aimed at eliminating the sources of process destruction by controlling the influx of participants, and its strategy of acquiring legitimacy through involving national governments in the policymaking process. In essence, it signaled a negotiated willingness to begin the "normalization" of Internet governance by absorbing the new global regime into the well-established pattern of intergovernmental organizations.

The President's vision of a particular type of reform, though, was not shared by many, as it became evident at the ICANN meeting in Accra, Ghana (March 2002). To channel the vigorous debate on ICANN's mission and scope, sources and methods of funding, and stakeholder representation, the Board instructed the four-member Committee on Restructuring, which was renamed Committee on ICANN Evolution and Reform (ERC), to recommend a framework for the structure and functioning of a reformed ICANN, and a timetable for implementing that framework (see BM 14 03 02).[407]

On one side of the debate were the ICANN leadership, the GAC (representing at the time 36 national governments, distinct economies and multinational governmental and treaty organizations), some national governments, and the ITU, which acclaimed

[407] A list of suggested issues was established to guide the Committee's work. Along with formulating essential functions and mission statement for ICANN, the Committee had to recommend mechanisms for participation in the decision making of "informed Internet users" and structured participation of all stakeholders, while "proper account of the public interest" was taken. To ensure both effectiveness and openness, the Committee had to come up with a system of checks and balances. The emphasis on designing "accountability mechanisms", which guided the ERC efforts, was counterbalancing the directives to exclude the at-large users from participation in the policymaking process. As a result, the new Bylaws, adopted by the Board in mid-December 2002, contained a rich arsenal of transparency and accountability tools. Among them were: 1/ control on Board's actions via both an internal Reconsideration Process, and Independent Review performed by a third party; 2/ Office of Ombudsman; 3/ Manager of Public Participation as a Staff position (see *Milestone Documents,* December 15, 2002).

Lynn's explicit intention to redistribute the decision-making power in ICANN. The President's Proposal was defined as "a roadmap for reform", "designed to instill confidence in key stakeholders and to ensure that ICANN [could] be more effective" (*ICANN Announcements,* February 24, 2002). The GAC members welcomed the President's Report and declared that they shared the view put forward in the document that "a private-sector/public-sector partnership will be essential to ICANN's future success" (*GAC Communiqués,* March 13, 2002).[408]

Moreover, some governments initiated national consultations on how ICANN should be reformed and what the governments' participation in ICANN should be.[409]

Houlin Zhao, Director of the Telecommunication Standardization Bureau (TSB) of the ITU, was quick, as well, to propose that "ITU could increase its cooperation with ICANN" as it, itself, constitutes a government-industry partnership, whose functions are

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[408] As Herbert Burkert observed, by 2000, "the GAC had become an increasingly important forum for European Union involvement [in ICANN]... The [European] Commission kept the Council informed about what was going on through regular reports on ICANN meetings and on the activities of the GAC" (see Burkert, 2003). Since the beginning of the ICANN Reform, the EU has insisted on "strengthening the GAC as *the* channel for public policy concerns", whose independence from ICANN should be ensured. In addition, ICANN was required to consult the GAC, whenever its activities were likely to involve public policy implications. In the author's conclusion, "the Commission's negotiating power in GAC is fully recognized at home", and "the Commission has been able to move a step forward in consolidating its position in the GAC and via the GAC toward ICANN". As a result, from December 1, 2002, on an interim basis, the Commission has been providing the Secretariat for the GAC.

[409] The UK government, for instance, stated its position that "a co-regulatory approach – where the Government sets the overall public policy objectives but where implementation is left to the private sector – is most appropriate" (UK Department of Trade and Industry, April 2002). For the German government, the GAC must be strengthened organizationally, and a more direct relationship should be established between GAC recommendations and ICANN Board decisions on issues of public interest (see *ERC,* FMET, June 20, 2002). The idea of opening ICANN's doors to the participation of foreign governments was, nevertheless, frightening for some U.S. participants. Thus, the following comment, posted by an anonymous author to the Reform mail list, illuminates the U.S.-centered view of ICANN, espoused by a number of participants: "It is simply a control issue. Why should other countries have equal say in a medium that was devised and is 'policed' by the US? I think this concept of 'charitable representation' for other nations will only hurt our own democratic system that we have grown so accustomed to; primarily by having other, rival governments influencing web infrastructure through their newly appointed board representatives. In short, no other governments should be 'given' representation when they have not contributed significantly to the management and inception of the internet itself. Especially when one considers the 'internet economy' and the democratic, free enterprise, free speech nature of the web today. Keep control within our American Democracy and way of life" (*Comments Online,* Anonymous, June 18, 2002).

similar to those performed by ICANN (Zhao, April 17, 2002). While stating that "ITU does not propose to take over ICANN's functions", the author could not restrain himself from suggesting that the ITU was the proper place for Internet DNS management: "It is hard to see why the existing ITU-T environment, in cooperation with ICANN would not serve the Internet naming and address allocation systems as well as they serve the existing naming and address allocation systems. Indeed, it would appear appropriate if ITU-T could explore new ways... to tackle new challenges in cooperation with ICANN".

On the other side of the debate were all DNSO constituencies, U.S. congressmen, and already established critics from outside ICANN, who, in principle, agreed with Lynn's argument that ICANN, as it had evolved, required reform in order to achieve the goals it had been set, but rejected the plan to revive ICANN as a public-private partnership.[410]

By the end of April 2002, the ERC had received only a few submissions that could be incorporated into the reform process. Nevertheless, there were signs of ongoing mobilizing efforts in ICANN's community concerning the issues of at-large participation, participation by governments, sources of funding, policy-formulation bodies, a proposed

[410] In a lively online exchange with other non-commercial participants, shortly after the Accra meeting, Mueller discussed what the effective strategy for the Non-commercial Constituency would be in view of the fact that "the arena for forging a consensus position has moved outside of ICANN". His conclusion was that "we should not waste effort petitioning a top-down Board committee [the ERC], but rather create political pressure from outside ICANN" (see *ERC,* Mueller, April 1, 2002). The openly cynical view on ICANN's power dynamics prompted the following response from Alejandro Pisanty, the ERC Chair: "[T]he ways to put 'political pressure from the outside' on ICANN all seem to involve the executive or the legislative (now also the judiciary) powers of the government of a single country [the U.S.A.]. I detect a contradiction with the principle of internationalization, and with the supposed aversion to the intervention of governments, to which many have reacted after reading Prof. Lynn's proposal" (see *ERC,* Mueller, April 1, 2002).

Nominating Committee, and independent oversight of ICANN (see *ERC,* Pisanty, April 20, 2002).[411]

On this weak basis of input, but heavily influenced by President Lynn's Proposal, the Committee produced three milestone discussion papers: 1/ on ICANN Mission and Core Values (May 6, 2002); 2/ on the Policy Development Process (May 7, 2002); and 3/ on the ICANN Structure and the Nominating Committee Concept (May 9, 2002). The public comments that followed served as a stepping stone for the ERC to present the Board, on June 20, 2002, with a full-fledged reform design – "ICANN: A Blueprint for Reform (see *ERC,* June 20, 2002). Acknowledging in the document that "ICANN, today, inevitably has a global policy role", the ERC concluded that it was time to close the debate and work on the details for the implementation of the Blueprint.

At the ICANN quarterly meeting in Bucharest (July 15, 2002), the Board adopted the ERC Blueprint for Reform with one significant recommendation – to consider the creation of an At-large Advisory Committee as a vehicle for informed participation of the user community. To meet its obligation to present a final set of implementation recommendations prior to the Shanghai meeting (October 2002), the ERC initiated four "assistance efforts" on 1/ accountability mechanisms (assigned to Becky Burr), 2/ the names policy development process (a group of constituency representatives), 3/ an At-large Advisory Committee (a group led by Esther Dyson and Denise Michel), and 4/ the formation of the Country-code Names Supporting Organization (ccNSO)[412] (a group

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[411] Especially noticeable among them were: 1/ the continuing efforts to organize "at-large members", led by Esther Dyson and Pindar Wong; 2/ the support for governments' participation in ICANN decision-making as a way to guarantee accountability to the community at large, coming from some people connected to "grass-roots efforts"; and 3/ the activation of proposals "that would give the ITU a preponderant role".

[412] The ccNSO Assistance Group, formed only in September 2002, focused on five issues: the scope of the ccNSO as a global policy-development body, the policy-development process, membership, the ccNSO Council, and the ccNSO structure. Because of the internal tensions in the ccTLD community, Compiled

comprising of ccTLD mangers and GAC participants). The expert advice provided by the assisting groups in the late summer of 2002 was, partially, incorporated into the ERC "Final Implementation Report and Recommendations" (October 2, 2002), which contained the project of new Bylaws, and was discussed in Shanghai.

At its meeting in Shanghai (October 31, 2002), the Board adopted the new Bylaws, and, in effect, sanctioned the transition from the ICANN 1.0 structure and operations to those established by the new Bylaws. With the exception of a few then-ongoing discussions on the proper contractual relations between ICANN and both the RIRs and ccTLD operators, and the powers of these stakeholder groups in the decision-making process, the first major reform in ICANN's short history was completed and the perceived danger of ICANN losing the DoC's support was averted. By extending the MoU for one more year (until September 19, 2002), the DoC, in fact, provided a chance for the reformed ICANN to prove its effectiveness.

A year later, in September 2003, the DoC decided to extend the MoU with ICANN for three more years, until September 30, 2006. The new ICANN President and CEO, Dr. Paul Twomey commented that this clearly indicated "the DoC's recognitions that ICANN is the right organization to manage the Internet's naming and numbering systems" (*ICANN Announcements,* September 17, 2003).

As the following analysis demonstrates, the reformed ICANN moved away from the original blueprint of the White Paper. Yet, the final design also differed from the

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Recommendations were published only in the end of February 2003 (see *ERC,* ccNSO AG, February 26, 2003). Thus, the ERC was able to present the Board with its "Recommendations on the Country-code Name Supporting Organization (ccNSO) on April 22, 2003 (see *ERC,* April 22, 2003). After becoming the main discussion topic in Montreal (June 18, 2003), the creation of the ccNSO was accomplished in 2004 – the ccNSO newly elected Council hold its first meeting in July 2004.

model envisioned and recommended by Stuart Lynn in his "ICANN – the Case for Reform".

8.2. The emerging new corporation

The 2002 reform was, arguably, about redefining ICANN according to the administrative philosophy of efficiency. The investigation in this section follows the three principal questions, targeting ICANN's identity, which guided the reform process:

1/ What should ICANN do – technical coordination or public-policy making?[413]

2/ What should ICANN be – a private stakeholder corporation or a public-private partnership?

3/ How should ICANN operate – through a consensus bottom-up or a top-down process of decision-making?

8.2.1. Redefining ICANN's mandate

The fundamental question of the scope of ICANN's mandate had been often used in ICANN 1.0 for argumentative purposes.[414] Thus, keeping the definition of ICANN's

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[413] The Markle Foundation highlighted the same alternatives in its statement, presented at the U.S. Senate Committee on Commerce, Science, and Transportation, Subcommittee on Science, Technology, and Space Hearing on ICANN: "ICANN was initially created to focus on the technical management of the DNS, but many of its 'technical' decisions necessarily involve 'public policy' choices. ICANN's decisions affect how people arrive at websites and what domain names they can have, how conflicts over trademarked domain names are resolved, how domains that expire are reallocated and how much data on users should be public" (see Markle Foundation, June 12, 2002).

[414] Danny Younger, the DNSO General Assembly Chair, analyzed the varying statements of ICANN's mission in the first four years in documents and statements, and he concluded, similarly, that they can serve as "a barometer of the times": "What does this transition of interpretations tell us?... [F]rom the very

mission inside the technical coordination boundaries served the interests of the technical cadre in two ways. First, their leadership role in ICANN was asserted based on both their expertise and historical legacy in developing the Internet. Second, the need for involving Internet users at large in any participatory and/or representative structures was eliminated, as the desired legitimacy of ICANN decisions was guaranteed by the experts' leadership position.

By 2002, after almost exhausting the original mandate to create substantive policies on domain names, ICANN was able to establish a limited mission for the coming years, focused on coordinating different parts and levels of the Internet. Immediately after the publication of Lynn's Report, the Staff grasped that opportunity, and came up with a draft of a statement of ICANN's mission (see *ERC,* March 7, 2002).

Despite the disclaimer that the document was not intended to be "a defense of a particular structure or mission", ICANN's role as "the organization designated separately by the U.S. Government and the IETF *to perform the IANA functions*" (hence, a technical coordination mandate – emphasis added) was stressed. A number of administrative tasks were enumerated as "day-to-day services" performed by ICANN.

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beginning ICANN has faced charges of being accountable to no one, of failing to establish membership provisions, and of making secretive closed-door sessions the norm rather than the exception – hence the language regarding transparency and accountability. As time went by, domain name issues and At-Large issues came to the forefront leading to subsequent language on competition and diversity. As problems developed within the DNSO, and representation for individuals as a constituency was repeatedly thwarted, the concerns over representation and the role of the bottom-up in the consensus process was then highlighted. When ICANN created collisions in the namespace and matters soured to the point that the alternate root community vocally came out in opposition to ICANN policies, mission language focused on the elements of trust and stewardship. Finally, when massive concerns became evident about the maltreatment of ccTLDs at the hands of ICANN management, and at a time when elections are denied to the At-Large, the mission statement language now deals with global representation and users. Our mission statements have become a barometer of the times. The latest push to 'limit' or 'restrict' or 'narrow' ICANN's mission is nothing more than another similar expression of the concerns-of-the-day that seeks to make its way into the newest form of the ICANN mission statement..." (*Comments Online,* Younger, April 24, 2002).

While it was difficult to deny that a large part of ICANN's responsibilities were related to developing and implementing policies, the policymaking mission was presented in relation to ICANN's operational and administrative services. The goal of this maneuver was twofold: to articulate a policymaking mission that would be perceived as 1/ non threatening to other Internet areas (i.e. regulating the content of communication on the Net - the "mission creep" threat), and 2/ requiring the participation of only technically-savvy stakeholders, since it was anchored in operational/administrative responsibilities. Thus, the level of expertise was introduced as a qualifying criterion for participation in the ICANN process.

After a number of rewritings[415], followed by public comments, ICANN's mission was formulated as follows: "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems" (see *Milestone Documents,* December 15, 2002). The controversial issue of ICANN's scope of policymaking was worded as "[ICANN] coordinates policy development reasonably and appropriately related to these technical functions" [1/ allocation and assignment of three sets of unique identifiers for the Internet, and 2/ coordination of the operation and evolution of the DNS root name server system] (Article I; Mission and Core Values; Section 1. Mission).

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[415] See the following Evolution & Reform Committee's papers (in *ERC*): 1/ "Working Paper on ICANN Mission and Core Values", May 6, 2002; 2/ "Recommendations for the Evolution and Reform of ICANN", May 31, 2002; 3/ "ICANN: A Blueprint for Reform", June 20, 2002; 4/ "First Interim Implementation Report", August 1, 2002; and 5/ "Final Implementation Report and Recommendations", October 2, 2002.

8.2.2. Limiting the access to ICANN's process

The response to the second identity question (whether ICANN should continue to be a private stakeholder corporation or a public-private partnership) arose from the above-presented mission definition. A limited technical-coordination, operational and policymaking mandate presumes more restricted access to the entity, based on certain qualifying criteria. Significantly, the requirement for both technical expertise and "public interest" representation were applied solely to the most amorphous of ICANN's stakeholder groups – the at-large Internet users. Thus, the criterion of "informed participation", which was introduced by Lynn, was later systematically included in Board resolutions, the ERC documents, and the new Bylaws to characterize the expected level of participation of the world users at-large. At the same time, no concern was given to the level of "informed participation" of other non-technical expertise stakeholders in ICANN, such as the intellectual-property holders, or governmental representatives.

Lynn's proposal to substitute government involvement in Board member selection for the at-large user participation and representation was identified as one of the two issues that had drawn the most criticism in the public comment (the other issue was the proposed Nominating Committee, which was perceived as a closed formation perpetuating the Board's power) (see *ERC*, May 9, 2002). The reason was that the idea of a potent At-large Membership (ALM) was still alive in ICANN, even after a number of stages of concept development and experiments. At the Public Forum in Accra (March 13, 2002), the expectation was that closure would be made on the at-large process.[416] It

[416] At the Public Forum, Hans Klein (Computer Professionals for Social Responsibility) addressed Lynn with the following plea: "[t]here weeks ago... you completely re-opened the process again, and... we're

was reported that there was already in the making an At-large Membership of about six hundred potential members and a secured sponsorship totaling $50,000.

The Board, apparently, took note of that development, and in a resolution adopted in Accra it gave the "green light" to the ICANN community's efforts to create at-large structures built upon bottom-up, self-organized, local Internet community institutions and other organizations (see BM 14 03 02). Working under the Board instructions to dismiss any global online Board-member elections as a means of achieving public representation in ICANN (on the basis of poor validity and practicality), but considering the vigorous public opposition to Lynn's ideas about broadening the government participation in ICANN, the ERC came up with a discussion paper on ICANN's structure (May 2002).

In the "Working Paper on the ICANN Structure and the Nominating Committee Concept" (May 9, 2002), while praising Lynn's proposal for greater government involvement as "one way to fill the vital need to reflect the public interest on ICANN's Board", the Committee discarded the idea to allow governments "somehow" to select five of the fifteen Board Directors. Instead, a broadly representative Nominating Committee was envisioned as charged with selecting "persons with diverse skills and perspectives and the right personalities".

Overall, in its "Blueprint for Reform" (June 20, 2002), the ERC presented a model of ICANN 2.0 that departed from the radical makeover in Lynn's Proposal. By

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now going to have process, process, process to Bucharest, we're going to have review and more process, process, process going into Shanghai... We have two solutions [the ALSC and the NAIS proposals]... Let's pick one and move on... If we could make closure now and, instead of focusing on process, getting those people and those organizations in more operational mode, I think that in a very short time you could have an At-large Membership..." (PF 13 03 02).

taking into consideration some public comments, the Committee kept this model still partially true to the original concept of a private stakeholder-representative body.[417]

First, the power dilemma was reformulated: from "*private* (stakeholders) vs. *public* (governments)", as it was in Lynn's Proposal, to "*industry* representation vs. *at-large* participation", which suggested that ICANN was still firmly anchored in the private sector. Government participation was still limited to the hitherto advisory role[418], yet, "to strengthen the GAC's integration into ICANN", a system of non-voting GAC liaison persons to the Board was envisioned, each of the supporting organization councils, and the other advisory committees. The GAC was to participate in the Nominating Committee, but with only one delegate, in keeping with the rest of the advisory committees. In view of the difficult negotiations with the ccTLD community, the GAC was requested to participate in the dialogue concerning the consummation of agreements between ICANN and the ccTLDs.

Second, contrary to Lynn's suggestion to use governments as a source of funding, the ERC rekindled the initial (at the time, rather controversial) formula of a per-name fee,

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[417] The following excerpt from the Blueprint for Reform presents the cluster of the relevant changes: "The proposed composition of the Board of Directors has been changed. The notions that the Board would have the power to ratify selections of the Nominating Committee and to appoint the chairs of the policy development organizations have been eliminated. The composition of the Nominating Committee has been established to be representative of both particular interest groups and the broader public interest. The structure of the GNSO [Generic Names Supporting Organization] has been more clearly stated, and the role of the TAC [Technical Advisory Committee] more clearly described. Government involvement has been strengthened in various respects to reflect the public interest but without sacrificing the essential private sector nature of ICANN" (see *ERC*, June 20, 2002).

[418] My assessment differs from the one expressed by Wolfgang Kleinwachter, namely, that "[w]ith the new ICANN bylaws (ICANN 2.0), governments got something akin to veto power. While the character of the corporation as a private entity remained unchanged, the concept of self-governance was greatly de-emphasized" (Kleinwachter, 2003). The new Bylaws, indeed, required the Board to take the GAC recommendations into account when public policy issues were discussed and, in case of disagreement with those recommendations, to try to find a mutually acceptable solution. Nevertheless, all this still falls under the rubric of "advisory role", as no governmental official may serve as an ICANN director, and, as the ultimate decision-making power remains with the Board, and it may not follow the GAC advices.

transferred to ICANN by those registries and registrars with whom ICANN had an agreement.[419]

An important outcome of the debate on the Blueprint for Reform was that the argument that ICANN's legitimacy depended on the at-large participation was evoked anew. This time, though, the stakes were whether ICANN would continue to operate as a private entity, or would be assimilated into the global intergovernmental regulative order. A self-sustaining at-large organizational structure was seen as providing a counterbalance to the GAC and the ITU ambitions.

Esther Dyson, the first ICANN Board Chair, was disappointed by the new delay in the implementation of an At-large Membership at the Accra meeting, and she took the lead in the self-organizing efforts. Taking advantage of the Board's general approval of the At-large Study Committee (ALSC) Report recommendations in Accra, Dyson asked for the community support for the creation of an At-large Organizing Committee (ALOC) as "a meaningful step towards a useful, constructive At-large Membership". Recapturing the original vision of a potent ALM, Dyson envisioned an ALOC working towards creating an ALM and selecting a number of Board members "with elections as the ultimate goal" (see *Comments Online,* Dyson, April 17, 2002).

The ALOC was formed (May 2002) as representing fifteen At-large Structures worldwide, with over 500,000 individual Internet users in over seventy countries. As an example of a consensus reached between the two groups that submitted alternative proposals for an ALM, it was led by representatives of both the ALSC and the U.S.

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[419] The "Blueprint for Reform" (June 2002) proposed $ 0,25 of the price paid for each registered domain name to be earmarked by the registries in contractual relations with ICANN as direct funding for ICANN. Later, in its "Final Implementation Report and Recommendations", the ERC reevaluated this proposal and stated that "a maximum pass through equivalent to 17 cents per domain name should suffice to cover [ICANN's] operational requirements..." (see *ERC*, October 2, 2002).

National Association of Independent Schools (NAIS). As the Blueprint for Reform did not elaborate on the at-large representation in ICANN, the ALOC felt free to propose a separate At-large Supporting Organization (ALSO) with a powerful presence in ICANN. This supporting organization was to share seats on the Board and the Nominating Committee with the other stakeholders, "to ensure that 'individual user' perspectives [were] represented in ICANN's policy and decision-making" (see *Comments Online,* June 10, 2002). Furthermore, its Steering Committee was to review proposed policies and provide input on them. The ALSO, itself, was to designate liaisons to other policymaking and advisory bodies, and even select its Steering Committee and Board members without the Nominating Committee's involvement.

Building strong regional at-large structures (Regional At-large Organizations – RALOs) was seen as the only viable alternative to the established national-governments' authority, where the issue of representing the public interest in ICANN was concerned. Therefore, the elaborate global web of regional at-large organizations needed significant structural power in the corporation, in order to convey effectively the individual Internet users' perspectives in the policymaking process.

The ALOC's proposed model of public participation in ICANN, in fact, deviated too far from the Reform architects' vision of a tamed, although powerful, Board and a controlled, and hence, effective process. At the ICANN meeting in Bucharest (June 28, 2002), the Board directed the ERC to consider the creation of an At-large Advisory Committee "as a potential vehicle for *informed participation* in ICANN by the broad user community" (emphasis added). Consequently, the ERC asked the ALOC leaders to identify a small group to provide assistance in filling out the details of an At-Large

Advisory Committee (see *ERC,* July 24, 2002). Thus, the ALOC attempt to reintroduce the concept of a potent ALM in ICANN was completely dismissed.

In a game of "give-and-take" with the ERC that followed, the Assistance Group tried to widen the boundaries of the concept of an advisory committee and accommodate in it as much of the vision of a strong at-large participation in ICANN as possible.[420] The ERC response, though, was one of cautious optimism.[421]

The first "manageable" step, suggested by the ERC, was to ask the Board to appoint the initial ALAC, as the members of the Assistance Group would be included in those initial appointments. The idea of representing the ALAC in all supporting organization councils and advisory committees, though, was rejected.

As for the ALAC's mandate in ICANN, it was required "to consider and provide advice on the activities in ICANN, insofar as they relate to the interests of the individual Internet users". The ALAC was charged, as well, with some informative, educational, and outreach functions.

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[420] In the group's report (August 19, 2002), for instance, it was suggested that "[t]he establishment of an ALAC should be viewed as a critical first step towards structured involvement of the individual user community in ICANN and, in particular, towards a formalized role in ICANN policy development process that ensures users' views are taken into account" (see *ERC,* ALAC AG, August 19, 2002). Unlike the existing advisory committees, the envisioned ALAC would require that the Board "design and adopt mandatory procedures through which ICANN entities will provide the ALAC with appropriate notice of upcoming and pending policy discussions and decisions to ensure adequate opportunity for At-large input and ICANN accountability". In addition, "[t]o ensure the ALAC's incorporation into ICANN", the ALAC should appoint liaisons to each of the supporting organization councils and the advisory committees, along with the Board, and five regional delegates to the Nominating Committee. To strengthen the at-large presence in ICANN, it was recommended that it review at-large involvement "after a full year and consider providing At-large with full representation on the Board".

[421] According to the ERC "Second Interim Implementation Report", "the ALAC proposed by the Assistance Group is a somewhat complicated – but we believe achievable – undertaking... there is a very long way to go from the presently available narrative and a diagram to a truly workable structure... we believe that we should proceed with small steps rather than giant leaps... we should begin with manageable steps... We are not as sanguine as the Assistance Group that this complicated structure can be functional immediately" (*ERC,* September 2, 2002).

It is difficult to see how this limited, mainly advisory, role of the ALAC could compare to the instruction that the ERC received from the Board in Bucharest (June 28, 2002) to "consider the creation of an At-large Advisory Committee as a potential vehicle for informed participation in ICANN by the broad user community" (see BM 28 06 02). The Assistance Group had suggested that the ALAC serve as a resource "that can be called upon to pursue specific questions involving users" (see *ERC,* ALAC AG, August 19, 2002), which implied a role similar to the one that the DNSO played in the early ICANN age via its working groups.[422]

The ERC and the Board/Staff ultimately preferred to keep the "wild" stakeholder element contained in its prescribed "advisory" boundaries, and focus, instead, on the representational structure of the At-large Constituency.

Considering the above-analyzed developments, we can conclude, in accordance with Froomkin, that, in terms of stakeholder representation and participation, ICANN 2.0 did not constitute an institutional innovation, but, rather, codified the already existing balance of stakeholder power in ICANN. In fact, the only stakeholder group that succeeded in gaining more structural power in the new ICANN was the ccTLD community[423], although it had to undergo a difficult process of negotiations with ICANN

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[422] Eager to substantiate the At-large Regional Organizations concept (RALOs), the Assistance Group went on to criticize the lack of opportunities for informed participation in ICANN: "ICANN needs to create mechanisms which provide a sustainable incentive for Internet users around the globe to participate in a constructive and informed way... ICANN currently has no mechanism in place to assure an ongoing dialogue between individual Internet users and their representative organizations and the Board, which would enhance the Board's 'informed decision making'... We suggest that ICANN (as it has done in the past, but with a more formal 'deliberative platform') experiment with the use of online and other mechanisms to provide virtual meeting places, and also improve its processes for soliciting and incorporating public input" (*ERC,* ALAC AG, August 19, 2002).

[423] As the ERC recommended, the broad outline of the original ICANN structure remained in ICANN 2.0. With the exception of the dissolved Protocol Supporting Organization (PSO), which was replaced by a Technical Advisory Committee (TAC), the creation of a separate Country-code Names Supporting Organization (ccNSO) was the single most important structural change as a result of the reform.

on issues of defining what constituted "global policy", how to select members of the ccNSO Council, etc.

8.2.3. Redefining consensus as derivative of the public consultation

Whether ICANN should continue to subscribe to the standard of consensus bottom-up policymaking or should embrace top-down decision-making in the name of efficiency was the third identity question of the Reform. It was also the most controversial one, because, by 2002, the argumentative grounds for an inclusive participatory ICANN had significantly shrunk.

First, while in the beginning consensus policies were needed to legitimize the new regime and invest it with enforcement power, later ICANN's implementation power began flowing from the contractual web, which included NSI (now VeriSign), the newly accredited registrars, and the newly accredited registry operators.

Second, the unsuccessful experience that the DNSO had in the first two years with reaching consensus through open-format working groups was used by the proponents of efficiency to claim that consensus could not be achieved among such diverse stakeholders, because of the uncompromising positions of some participants on property-rights allocation issues.

Third, the results of the ICANN practice of bypassing the consensus-policy requirement (i.e. in 1999, the registrar accreditation policy and the UDRP) were presented as a success in the official ICANN discourse (status reports to the DoC,

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Consequently, the DNSO was renamed Generic Names Supporting Organization (GNSO). There were no changes in the GNSO constituency structure, as well.

testimonies at congressional hearings, press interviews, etc). The prolonged consensus-building process, conversely, was inscribed in the "failure" column. It seemed as if in the competition between inclusive consensus-building and Staff-managed decision-making, the top-down rationality had proven its efficiency.

It was in this context of shrinking support for the consensus policymaking principle in ICANN that Lynn came up with his Proposal for Reform (February 2002). In the President's view, ICANN was overburdened by process at expense of effectiveness; it was not seen as credible by key stakeholders, but as a "loud" debating society; it had favored process over progress, and form over substance; the process had become an end in itself at the expense of effectiveness; and, there had been too many distractions (such as the at-large elections[424]) (see Lynn, 2002).

The requirement for stakeholder-consensus policies was completely omitted in the President's Proposal, in favor of "*real* participation" via "self-organizing forums" with debating mandates. The lack of any detail about the development of such policy implied the adoption of the classic top-down decision-making process, taking into account, nevertheless, the public input generated by the forums (the "public consultation" formula).

To stimulate some debate on the ICANN operating formula, the ERC began[425] with proposing the conceptualization of both what constitutes consensus, as a

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[424] Later Lynn stated: "I've made no secret that I'm not a fan, at least today, of any of these proposed online voting processes. I do not consider involvement voting for somebody every three years and, then, not be heard within between. I want to give a real meaningful participation and cooperation in the world of ideas and meaning. Coming to the table and pretending that some thirty or a thousand voters around the world, voting once every three years, can possibly represent the public interest in a world, where there are over four or five hundred million users of the Internet...." (interview with the author, April 19, 2002).

[425] It is appropriate here to suggest that the Reform was not only initiated, but conducted by the Staff, through the ERC. Consisting of only five volunteers, the ERC would not have been able to complete the transition to ICANN 2.0 in less than a year without Staff's assistance. The process comprised of large-

"substantive decisional standard", and what the procedures for reaching a decision should be (see *ERC,* May 7, 2002).

On the first topic, a historical document-based review was presented to demonstrate that ICANN was not working under any obligation to its creator – the U.S. DoC – to reach consensus on each policy issue discussed by the Board. The conclusion was that "there is no mandate that only 'consensus' recommendations be forwarded to the Board", and that "the Board could act on recommendations that were not (at least by the test set forth here of a two-thirds vote of the Names Council) the result of community consensus". Overall, it was suggested that ICANN's efforts to reach consensus reflect a community preference, not a fundamental mandate from ICANN's founding (*ERC,* May 7, 2002, 3-4).[426]

In this light, the lengthy ERC argument concluded that: 1/ while desirable, consensus was not always attainable, and, hence, the Board should be able to make

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scope deliberations, involving a significant number of issues, submissions, and electronic messages, as well as of producing a number of draft documents on the basis of reviewed constructive ideas or criticism. The following excerpt from the interview with Lynn supports such an observation: "There are certain places where I may take the leadership... The case of the Reform has been a case of faith. That came out of my belief that it's important that we [the Staff] join the reform discussion now in order to transform ICANN into an effective organization that will do what it needs to do. So, yes, I did put this on the table first, but the dialogue now is where, precisely, it should be – on the Board, in the Committee on the Evolution and Reform chaired by the Vice-Chair Alejandro Pisanty. I'm contributing to that, but the Board is showing the proper leadership. Yes, I know some people say, 'where is the Staff...'....that's nonsense! The Staff is doing an awful lot of the work – what it's supposed to do, because the Board members are volunteers and they look to us, who are working full-time to develop the position papers and so forth, so we are in consultation to the Board, and not in opposition to the Board" (interview with the author, April 19, 2002).

[426] It was acknowledged, though, that ICANN's policy-enforcement capability was intimately linked to the notion of "consensus policies". Thus, in the original NSI registry agreements, NSI negotiated that it would comply with only those ICANN policies which qualified as "consensus policies". In ICANN's contract with NSI, "consensus policies" were defined as follows: "'Consensus Policies' are those adopted based on a consensus among Internet stakeholders represented in the ICANN process, as demonstrated by (1) the adoption of the policy by the ICANN Board of Directors, (2) a recommendation that the policy should be adopted by at least a two-thirds vote of the council of the ICANN Supporting Organization to which the matter is delegated, and (3) a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support and opposition to the proposed policy" (*Milestone Documents,*", November 4, 1999).

decisions "over the isolated and determined opposition of one or a few members of the community", and 2/ the Board should be free to disregard community consensus, "based on its educated perception of the best interests of the whole community".

The argument for an empowered Board was completely in line with Lynn's vision of a board of trustees, and, ultimately, sidelined the notion of community consensus as a norm in ICANN. This was, nevertheless, seriously challenged by ICANN critics. In a submission paper, posted to the reform comments listserv immediately after the publication of the ERC Blueprint, David Johnson, Susan Crawford and Becky Burr (the former DoC senior officer) expressed their disagreement with the position of "eliminate[ing] the consensus requirement altogether – giving the Board ultimate power to make decisions it considers to be in the global 'public interest'" (see *Comments Online,* Johnson, Crawford and Burr, June 26, 2002). The authors reminded the ERC that ICANN not only owed its enforcement power, in regard to the agreements with registrars and registries, to the notion of documented "consensus policies", but also that its authority and legitimacy were "deeply rooted in its commitment to bottom-up consensus policy development". On this basis, they warned that ICANN would face "fatal challenges to its authority", if it "simply claims to make rules that no one has agreed to obey".

Contrary to the common view that the ICANN consensus process was doomed, these authors suggested that the reason for the difficulties in reaching consensus should be sought in the leadership of the process. They recommended a more proactive role for the Board and the Staff, consisting of: 1/ "calling for work on a particular consensus policy"; 2/ "indicating its preliminary beliefs about which parties would be affected by

the policy"; 3/ "appointing a facilitator who would be personally responsible for creating the written consensus-policy report"; and 4/ "setting strict deadlines for submission of the report to the relevant supporting organization" (*Comments Online,* Johnson, Crawford and Burr, June 26, 2002).

With the assistance of a group constructed by the ERC (July 2002), and comprised of well-known DNSO constituency representatives, a full platform for staged, time-specific processes for policy development in the Generic Names Supporting Organization (GNSO) was included in the Proposal for New Bylaws (see BM 31 10 02, Annex A to Appendix A). The uniform fourteen-stage Policy Development Process (PDP) spanned a period of 95 days (from "raising an issue" to "implementation of a policy").

Arguably, submissions like that of Johnson et al. were not taken into consideration in laying out the matrix of the PDP for the GNSO. They helped, though, to move the discussion on consensus policies from assigning blame to "unjustifiable dissenters' opposition" to structuring a predictable and, hence, efficient, policymaking process.

Despite the rhetoric of building consensus as the desired goal in ICANN[427], the GNSO PDP was, simply, a manual for gathering information and constituency public input, involving four levels of management: the Board, the Staff, the GNSO Council, and,

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[427] The ERC's "First Interim Implementation Report", for instance, stated that "[i]n every case in which a policy issue is being discussed, it is the obligation of all participating to seek consensus if possible... This can only be effective if the vast majority of those participating make a good faith effort to find a consensus position. Irrational or purely selfish arguments or strategies are not likely to promote this objective. Thus, in our view, those responsible for the policy-development process should make every effort to find a consensus solution, but if that is impossible because of the unreasonable or irrational refusal by one or more parties to seek consensus, that conclusion should be documented and given appropriate consideration in the final decision-making process" (*ERC,* August 1, 2002) .

eventually, a task force. Aside from the fact that the term "consensus" was not even mentioned in the document (see *ERC b,* October 2, 2002), there were no instructions for mediating stakeholder positions, or applying other management strategies aimed at formulating consensus proposals, as Johnson et al. had suggested. On the contrary, the prescribed process was one of actively seeking input (constituency statements, opinions of outside advisers and experts, public comments) and "compiling" it into reports, which would be put to the vote on each of the levels.

Significantly, the outlined PDP assigned a key role to the Management in 1/ including a policy issue in the ICANN agenda – it was a Staff Manager, along with the ICANN General Counsel, who would recommend (or not) to the GNSO Council whether a raised issue should become a subject of a PDP; 2/ interpreting the public comments and constituency statements, along with the chair of a task force if such was created, and presenting that input in both Preliminary and Final Task Force Reports (i.e. an analysis of how the issue would affect each constituency of the task force, including any financial impact on the constituency); 3/ selectively presenting the public comments on the final Task Force Report, applying "reasonable discretion"; and 4/ presenting the Board with a report on the Council's views on a particular policy issue, as the basis for the Board decision.

Thus, the new Bylaws officially sanctioned the Management's power to frame the policy discourse in ICANN and manipulate the outcomes through interpretation of stakeholder perspectives. The Board's right to deviate from any recommendations was

codified, as well, although, to reject a Council's supermajority vote recommendation[428], a negative vote by more than 66 percent of the members was needed.

Overall, the Reform had a profound effect on strengthening the Board policymaking power, especially in the gTLD area.[429] Because of the widely-shared opinion in ICANN that "[b]ottom-up policy development seems to be working effectively within the ASO [Address Supporting Organization] framework", the ASO retained its structure and function to formulate address-allocation policy (see *ERC*, May 9, 2002). The ccTLDs' battle to create a supporting organization fully responsible for identifying "global policies" and developing consensus policy proposals to be ratified by the Board led, ultimately, to curtailing the Board's authority in the ccTLD area as well.

8.3. Observations and conclusions

It has been already suggested in this thesis that ICANN, as it was originally designed, was an embodiment of postmodern, neoliberal governmentality.[430] Yet, this

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[428] The legal definition of supermajority (or qualified majority) is a requirement for a proposal to gain a specified level or type of support which exceeds a simple majority in order to have effect (see http://www.answers.com/supermajority&r=67#copyright).

[429] The following excerpt from the comments on the ICANN reform, submitted by James Love on behalf of the Consumer Project on Technology, illuminates the critical attitude of some participants towards that tendency: "It seems as though the protocol and numbering supporting organizations have much stronger internal decision making traditions, and it appears to be much more difficult (at present) for ICANN to impose its will on these groups. In contrast, ICANN has turned the DNSO into essentially an advisory board, ignoring its recommendations when it wants (such as the DNSO recommendation for .org), or even micromanaging domain name decisions, such as the ICANN board's insistence that the airline industry use .aero instead of .air. for its new top level domain. We support far greater decentralization of decision making. We think that decentralization should include greater separation or independence for the three supporting organizations, and probably the separation of the management of IANA and other ICANN managed functions" (*Comments Online,* Love, April 30, 2002).

[430] The features supporting such a definition are: 1/ ICANN's hybrid identity as a private body developing a regulative regime with public-interest implications, and as a technical-coordination agency engaged in market creation and regulation; 2/ the principles of inclusiveness and diversity, based on the activation of a global network of stakeholders with differing interests; 3/ the participatory and deliberative mechanisms of policy-development, which culminate in the consensus-reaching requirement; 4/ the informality of the deliberative process, supported by the online environment; and 5/ the emphasis on effectiveness and

institutional experiment never reached a stage of full blossom. For the architects of ICANN 2.0, the corporation was not the place to experiment with the postmodern mentality of a global participatory and deliberative democracy. Despite the angry voices of predominantly U.S. non-commercial, academic, or libertarian participants, who insisted that ICANN's legitimacy was rooted in the participatory consensus policy-development model, the architects of the Reform implemented a plan, drawing on the governmentality model of centralized regulation.

ICANN 2.0 still bore a resemblance to the original model, but the erected structure and defined policy-development process heralded a significant departure from it.

First, the scope of stakeholder participation was diminished – from virtually encompassing the range of global Internet users to considering only "informed participation" – a criterion that has never been defined. In effect, by introducing this qualifying criterion, the Reform architects substituted the "representative" for the "direct" (deliberative) participation formula.

Second, public consultation (gathering public input), which had always been an important element of ICANN policymaking, was legislated by the new Bylaws as the sole manner of conducting a "bottom-up" process. Instead of proactively mediating stakeholder deliberations to achieve consensus, the policy-development levels in ICANN (the GNSO Council and the Board) were only obliged "to take into consideration" the proposals submitted by the constituencies, advisory committees, task forces (if inaugurated), and "informed" participants.

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flexibility, defined in the principles of self-regulation, of limiting the governmental presence to an advisory role.

As was the case with the original model, ICANN 2.0 resulted from the dynamic negotiations among stakeholders with particular power potential. In both cases, technical experts, historically charged with the task to manage the Internet system of address and name identifiers, initiated institutional changes according to their perception of the needs of the day.[431]

In 2002, the ICANN Management exploited the widespread dissatisfaction with the Corporation and initiated a reform benefiting particular stakeholders (i.e. the European Union and its member-governments, and the registry/registrar operators community, as their voting power on the GNSO Council increased). The President, Lynn, acted on his belief that a more effective and predictable ICANN could persuade the U.S. government to follow up on its promise to transfer the authority over the legacy Internet root to ICANN. Therefore, the focus was shifted from policymaking based on achieving stakeholder consensus to decision-making by a mighty Board, constructed of selected individuals. In addition, by redefining ICANN as a public-private partnership, where the perimeter of governmental participation was expanded, it was expected to close the gaps in the ICANN contractual web (achieving agreements with the ccTLDs and RIRs), which was a task left over from the original ICANN mandate.

As the discussion in Chapter 9 will demonstrate, although ICANN failed to implement the experimental institutional model of multistakeholder collaboration based

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[431] In 1996, reflecting the globalization and commercialization of the medium, the U.S. Internet developers attempted to privatize the Internet DNS management under an internationally-representative institutional arrangement (the gTLD-MoU), involving established international organizations (the ITU and WIPO), and shifting the geographical locus of policy-making from North America to Europe. As has already been explained, this challenge to the U.S. Government's authority over the Internet root precipitated the creation of ICANN.

on consensus-building, and, ultimately, transformed itself into a public-private partnership formation, it produced some long-lasting transformative effects and a legacy of innovation, learning, and policies based on partial consensus, which is now being actively studied and incorporated in the recommendations of the WGIG and the WSIS process.

Chapter 9. On the road from ICANN to Global Internet Governance

Seven years ago, ICANN was an exotic novelty in the informal Internet governance landscape. In 2005, the world speaks "ICANN-ish" when such features of the evolving global Internet governance regime as "multistakeholderism", consensus-building, transparency, and collaboration are discussed in fora such as the UN WSIS. How did this happen?

By following the developments in ICANN in its formative years and applying an analytical process-oriented model that is suitable to the unique ICANN case, the present thesis provides particular answers to this question. Some of them stem from the significance of the evolving regulatory regime, the stakeholders involved, and the power play observable among them. In this case, I refer to the network of interdependencies that ICANN exhibits.

The rest refer to the host of long-lasting, often intangible outcomes that can be linked back to ICANN. In that case, I bring the notion of a collaboration as a power production network.

The following is an attempt to present systematically these two groups of conclusions that were drawn from the case study and to suggest their significance to the global Internet governance project as it is discussed within the UN. The summary of "lessons learned" from the ICANN experiment, as extracted from the present thesis, is inscribed in my realization that the pioneering role of ICANN is more productively

interpreted when the long-term outcomes are detected through the application of a suitable analytical model, and the evolution of the medium is considered.[432]

9.1. ICANN as a network of interdependencies

The analysis presented in this thesis suggests that ICANN could be defined in a number of ways: 1/ as the regulator of a global common pool resource (the Internet domain-name space), according to "regime" theory; 2/ as an experiment in global governance – a private corporation functioning in the public interest – in accordance with the global public-policy networks concept; 3/ as a multistakeholder consensus-seeking entity, according to the theory of collaboration. Representing distinct theoretical and disciplinary approaches to the case, these definitions are based on a common recognition, which was formulated in the thesis as seeing ICANN as a network of interdependencies.

It was the aim of this thesis to untangle these interdependencies and demonstrate their influence on the process of policymaking and its outcomes in ICANN. The concept of power, as developed by Foucault, was used as a "scalpel" to get through the thicket of international trade relations, historically-set inter-stakeholder relations, and organizational/administrative dynamics of the collaborative process. By focusing on the process in ICANN, this particular approach was able to grasp the perception of stakes that motivated the principal players to reach at particular strategies and try to influence the outcomes of the policy-making process. As a result, ICANN emerged from the

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[432] On the latter, in 2005, the Internet user base has grown to around 940 million, which marks a growth rate of 160 percent since 2000; the North-American continent registers the highest level of Internet penetration – 68 percent (the above statistics were accumulated by the end of July 2005 (see Internet World Stats, http://www.internetworldstats.com/stats.htm), and there are around 57 million registered active domain names; around 41 million of them are in *.com* TLD (see http://www.whois.sc/internet-statistics/).

analysis as a distinct issue-area collaborative network of functionally and geographically dispersed stakeholders, which was mandated by a single national government to develop the governance regime of a global common pool resource.

Thus, the large U.S. businesses, alarmed by the growing cybersquatting tendency and increasing cost of litigation put the issue of trademark protection on the intergovernmental agenda (via the WIPO) and, in fact, convinced the U.S. government to intervene in the DNS management controversies.

On their part, the U.S. Internet technical cadre tried to apply a preemptive strategy of creating a formal regulatory regime in the DNS area without the direct involvement of the U.S. government, international standard organizations such as the ITU, and other national governments. The ultimate goal was to preserve the locus of authority over the key Internet infrastructure. This was presented, though, as protecting Internet stability and security.

The U.S. government, itself, while initially inclined to transfer the responsibility for the Internet root management to the newly formed private corporation, and, thus, promote its long-term agenda of liberalizing international trade regulations, came gradually to the realization that it is strategically important to preserve the *status quo* of its ultimate authority over the Internet root as an instrument of "soft power".

The host of business players (mainly from the U.S. and Europe) seeking entrance to the lucrative gTLD registration market, supported the new regulator in its efforts to oust a private corporation, Network Solutions, from its monopolistic position in DNS management.

Yet, the geographically dispersed RIR and ccTLD registry operators fiercely opposed ICANN's pressure to be co-opted into its contractual web. The ccTLD operators (in particular, from the developed countries) even sought alliance with their governments and the ITU in order to preserve, as much as possible, their right to develop local market regulation policies and, thus, limit ICANN's appetite towards globalizing the regime rules.

Finally, the amorphous Internet user community appreciated the private regulator as advancing direct democracy in the global arena, for ICANN, as originally designed, was to give them a voice and a chance to influence the decision-making process (via the at-large directors and the promised at-large membership). Nevertheless, their concerns over privacy protection, freedom of choice of domain names (which were considered a form of self-expression), and, in general, cheaper and better services were not rated paramount, at the time, by the power holders in ICANN.

As diverse as all those stakes were, they converged on a shared understanding of the common interest in preserving both the stability of the global Internet and the atmosphere of technological innovativeness. These two concerns belonged to the expertise field of the Internet technical cadre, which possessed the legacy-authority to decide what was "good" for the evolution of the communication medium. This constituted a particular advantage when entering the collaborative process in ICANN. In a direct confirmation of Foucault's interpretation of how the power/knowledge formula works, the epistemic community of Internet experts, in their capacity of managers of the collaboration, established themselves as the power holders in ICANN.

In the three areas which were scrutinized in the above-presented analysis – namely, legitimizing ICANN through establishing contractual relations with registry/registrar operators; implementing the collaborative organizational model; and creating substantive policies – the Management's approaches were perceived by a number of stakeholders as promoting a top-down, centralized policy-making process, and, thus, as compromising the collaborative arrangement.

Indeed, the strategy of sabotaging the consensus policy-making model deprived ICANN of equal and fair representation of the diverse stakeholder groups (the DNSO business-dominated constituency structure; the never-materialized at-large membership structure). This translated into a policy agenda set by trademark and business interests, which, even prior to ICANN, had been well-consolidated and better organized than the non-commercial constituencies. As a result, the emerging regulatory regime for the Internet DNS management was designed to protect and secure the already existing market advantages for large business players. Besides obtaining control over their intellectual property in Cyberspace, these firms were granted ICANN's accreditation to develop domain name registries and/or provide registrar services. The entrance to the lucrative *.com* and *.org* TLD markets was denied to a host of other applicants on the basis of the requirements of high technical expertise and sufficient financial assets.

The ultimate outcome of this situation, as demonstrated above, was the transformation of ICANN into a public-private partnership and the withdrawal of a number of active non-commercial participants from the process. More importantly, and as suggested before, the conviction that ICANN was a failure as an institutional innovation spread to the very model that the corporation was to epitomize. It became a

shared conclusion that, because of the complicated property issues discussed in ICANN and the uncompromising stakeholder positions, a collaboration of the designed bottom up type was doomed to failure.

As my analysis has demonstrated, a large-scale collaboration, such as ICANN, is subjected to enormous environmental "turbulence", and the chances of achieving consensus diminish with further diversification of the participating stakeholder membership (Turcotte and Pasquero, 2001). Thus, some of the authentic consensus-seeking working groups in ICANN (1999 – 2000) were able only to produce very general policy recommendations, while providing the Board with a number of suggested (often, contradictory) concrete approaches and mechanisms.

On the other hand, such a correlation was not found between the possibility of reaching consensus and the type of issues ICANN was mandated to discuss in its formative years (allocation of property rights policies), as has been suggested by some authors (Mueller, 2000, 2002; Weinberg, 2001). Based on previous publications (i.e. Gray, 1989; Johnson, Post and Crawford, 2003) and my personal research observations, it was concluded that the failed attempts to create consensus policies in ICANN should be attributed rather to 1/ the structural imbalances (the overwhelming representation of the domain-name-registration industry and large business interests in the DNSO constituency structure, and the lack of legitimate participation by the Internet users community), 2/ the time-pressure situation (the expiration date of the MoU with the U.S. DoC at the end of September 2000), 3/ the financial uncertainties, which translated into negotiating power for some stakeholders, and 4/ certain leadership deficiencies in conducting the process (for instance, instead of nurturing the difficult deliberations through mediation, the Staff

jumped at the opportunity to take over the submission of policy recommendations to the Board).

In sum, in a network of interdependencies, success is conditioned upon leadership, "shared power" formula, clear-cut consensus rules and criteria, and skilful mediation of the deliberative process.

In contrast, ICANN was urged to complete a rather complex policy making and implementation agenda for a limited time without any of the above factors secured in advance. While still building its structural components (and without secured finances) the corporation was forced to come up with an approval of the WIPO's vision of a trademark protection regime. There was really very little room for collaboration and consensus building when the Staff developed the rules for a competitive domain name registration market as well.

Yet, the enormous enthusiasm of the hundreds of participants in the pre-ICANN process spilled into passionate online and face-to-face discussions and full-fledged policy proposals. Despite all the disappointment from the behind-the-scene alliance-building, individuals – experts, academics, and community activists – used the open ICANN channels of communication to influence the process and its outcomes. Because of them, the intellectual property interests were not able to receive their so-much desired preemptive protection of "famous trademarks", for instance, and the five at-large directors were able to counter those policy proposals, which were perceived as being harmful to the free choice and free expression interests.

What was gradually evolving from the uncompromising battle of interests was a real global network of functional and geographical communities of participants in the

ICANN experiment. As one of the most significant long-lasting outcomes of the ICANN process, this network now comprises individuals who belong to diverse cultures and stakeholder groups, but identify themselves with a common issue-area and experiences. Consequently, the shared identity of an "epistemic community" has emerged. In their particular local settings, each of the members of this community conveys the intellectual, institutional, and cultural influences that ICANN, as a type of global public-policy network, has generated and accumulated. In this sense, I designate ICANN as a power-production collaborative network that radiates social-transformative impulses.

9.2. ICANN as a power-production network

The present thesis was informed by Foucault's (1980) insight that power "needs to be considered as a productive network which runs through the whole social body, much more than a negative instance whose function is repression". Such an "environmental" approach to power allowed me to conceive of ICANN as both an institutional innovation produced by a historically specific power matrix, and an emerging power matrix, itself, which has produced policies and some long-lasting intangible outcomes.

In the ongoing debate of globalization, such formations are designated as "global public policy networks" (Reinicke and Deng, 2000), which are capable of closing the operational and participatory gaps in contemporary governance. In the absence of accumulated analytical models for these entities, the ICANN case provides the ground for observing power-generating dynamics and social-transformative outcomes.

As it was argued in the thesis, since the goal of a collaboration is to reconstitute a number of social relations in a particular problem domain, the tangible outcomes are deposits of transformative social energy. Indeed, as the present analysis demonstrates, ICANN has placed issues of property rights, privacy and security in Cyberspace on the global agenda by developing a global regulatory regime for a common pool resource. By (partially) implementing some of the features of the collaborative consensus model, ICANN has not only enhanced the enforceability of these policies, but also enlarged the social and geographical basis of developing and disseminating relevant expertise. And this is a complex and multilayered knowledge-edifice: about the technology, its social context, the relevant market relations, legal regulations and considerations, as well as the particular stakes of the other participants, their strategies, cultural biases, strengths and weaknesses. Finally, by closing the participatory gap according to the "shared power" formula (multistakeholder participation and representation, online and face-to-face deliberation, and consensus-developing in working groups and task forces), ICANN aimed at enhancing the level of both legitimacy of the governance mechanism and competence to deal with increased issue complexity.

Yet, even more intriguing are the intangible outcomes of the ICANN process. The testimonies of some active non-North-American participants, for instance, suggest that being exposed to the ICANN tension-leaden process translated into learning how to approach a debate, how to effectively argue one's ideas and positions, and how to assess the dynamics and the outcomes. With its intensity, the ICANN process has forced these participants to overcome particular cultural biases and adopt norms and values which are characteristic for the international Internet technical community, or for the North-

American legal and academic circles, or even for operators of Internet functions from the developed countries.

On this basis, I argue, we can speak now about a definite global "ICANN community", based on the "shared power" knowledge, experience, and governmentality. This community has been critical to the development of the network of concerned and active civil society representatives that has constituted the pool of knowledgeable participants in the WSIS and WGIG processes regarding Internet governance.

The story of ICANN 1.0, which was presented and interpreted in this thesis, teaches us of the dialectics of the political process, when the investigative focus is on its power dynamics. Thus, while ICANN failed to completely implement the experimental institutional model that was based on Internet-community consensus, and, ultimately, transformed itself into a public-private partnership formation, it left a legacy of innovation, learning, and policies based on partial consensus, which was actively studied and much of it incorporated in the WGIG recommendations.

With its open-to-participation format and consistently organized, although expensive, quarterly meetings around the world, ICANN deliberately has been knitting an ever-expanding network of informed-participants and, thus, has introduced local governments and communities in Africa, Latin America, and Asia to the particularities of Internet DNS management and policies. Paradoxically, without achieving (and, in some degree, even compromising) the ideal of a purely private consensus-based multistakeholder policymaking, ICANN stimulated the taste and cultivated the skills for active citizenship among intellectuals and common Internet users in the developing

world, many of whom now participate in the Internet Governance caucus of WSIS civil society.

In essence, ICANN served as a test tube for the probing of, first, the real scope of the alleged "withdrawal" of the world's governments from instituting regulatory regimes for the emerging communication technologies, and, second, the real capacity of the private sector and civil society to take over policymaking "in the public interest".

The U.S. government's privatization policies of Internet infrastructure layers (the NSFNET/Internet backbone privatization, 1994, and Internet DNS management privatization, 1998) signaled a decisive shift in contemporary dominant governmentality.[433] Indeed, the 1990s are seen as a time of, first, re-problematizing the paradigm of government sovereignty in International Relations due to the globalization project of the developed countries, second, institutionalizing a new form of knowledge, namely, expert knowledge, as the digital network technologies emerged as the infrastructure of the globalization project, and, third, promoting particular practices and techniques of government, which "fabricate and maintain self-government" (Miller and Rose, 1993) and substitute "community" for "society" as the new moral-relations network (Rose, 1996).

As the first experiment in applying a purely private multistakeholder collaboration on the global governance level, ICANN epitomized this shifting governmentality. Yet, ICANN's identity was a contested issue due to the structural benefits that the different institutional models provided. Embedded in a historically specific power-relations network, which was dominated by technical experts working in alliance with certain

433 Let's remember that, in the literature, the term "governmentality" refers to a historically specific constellation of problematizations, forms of knowledge, and practices of government (see Chapter 2.1.3).

international organizations, European governments, and business interests, ICANN was, ultimately, redefined according to the industrial age governmentality model of securing the leading role for the governments.[434] Ira Magaziner was, apparently, over-optimistic when, in February 1998, he predicted 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".

The Working Group on Internet Governance's final report (July 2005), for instance, outlined four options for formalizing and institutionalizing Internet global governance with regard to the roles and responsibilities of governments[435], and all of them envisioned an enhanced role for national governments (see WGIG, July 2005). Moreover, ICANN reformed itself, in 2002, by strengthening the Governmental Advisory Committee's role in the policymaking process, and substituting public consultation for the original bottom-up consensus-building process.

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434 In the WGIG 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, June 2005, 54-55).

435 These are: 1/ a Global Internet Council (GIC) consisting of members from governments with appropriate representation from each region and with involvement of other stakeholders; this council would take over the functions relating to international Internet governance currently performed by the U.S. DoC; it would also replace the ICANN Governmental Advisory Committee (GAC); 2/ there is no need for a specific oversight organization; it may be necessary to enhance the role of ICANN's GAC in order to meet the concerns of some governments on specific issues; 3/ for policy issues involving national interests, given that no single government should have a pre-eminent role in relation to international Internet governance, an International Internet Council (IIC) is created to fulfill corresponding functions, especially in relation to ICANN/IANA competencies; and 4/ "start from scratch" by creating a Global Internet Policy Council (GIPC), a World Internet Corporation for Assigned Names and Numbers (WICANN), and a Global Internet Governance Forum (GIGF). As the Canadian legal scholar Michael Geist commented, "[o]ption #3 provides the best prospect for the basis for negotiation" among governments, because it is the only one satisfying, simultaneously, the U.S. government' resolution not to allow international oversight and the dissolving of ICANN, and the other governments' desire to assume responsibility for the Internet governance issues that arise on the national level (*Journalistic Articles,* Geist, July 14, 2005).

Despite this trend, ICANN has been recognized as *the* principal reference point in the current global Internet governance debate. Thus, it is noted in the WGIG Background Report (June 2005) that "ICANN has developed a model for involving groups of stakeholders in a meaningful way by grouping them into separately organized constituencies. This allows different groups of stakeholders to interact effectively with those of other constituencies as well as within the organization itself. This model might well prove effective in other organizations as well" (58).

Along with the organizational model, ICANN provided the normative framework for the collaborative process in the WGIG: to be "open and inclusive", to conduct a transparent deliberative online process, to webcast the public sessions, which were held in conjunction with the WGIG meetings, etc.

In addition, apparently learning from ICANN's shortcomings during the initial working-group stage of policymaking, the WGIG conducted public consultations and discussions on the basis of a series of draft working papers: "The production of these papers also secured the effective working of the group via the Internet and thereby laid the foundations for future collaborative work within WGIG" (3).

In sum, after ICANN, it is impossible to imagine the regulation of a global commons field (and the Internet domain name and address spaces belong to that field, as discussed in Chapter 4) without the leading participation of technical experts and civil society players, such as non-governmental organizations and academic scholars.[436] Gradually, the two hitherto competing normative sets – that of efficiency, and that of

[436] In the same vein, the ICANN President and CEO Paul Twomey (June 14, 2005) suggested that if a "continued discussion platform directed to the full range of issues" on Internet governance emerges from the WSIS process, "it should adopt a genuinely multi-stakeholder and equal partnership approach".

consensus-building, are beginning to fuse together and shape the exclusive governmentality of the current century when new hybrid institutional forms are being generated.

The overall inference of this thesis is, then, that consensus-based multistakeholder collaboration, as an emerging governance technology on the global stage, exhibits specific dynamics of interaction, negotiation, and deliberation, which should be studied and translated into effective governance strategies. ICANN was, indeed, the ground-breaking experiment of such advanced policymaking in the field of global communication, and the "lessons learned" from this case must be used when new entities in the global Internet Governance regime are designed.

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Appendix A

List of Acronyms

- **ACLU** – American Civil Liberties Union
- **ACM** – Association for Computing Machinery
- **AFNIC** – Association Française pour le Nommage Internet en Coopération
- **AIP** – Association of Internet Professionals
- **ALAC** – At-large Advisory Committee
- **ALM** – at-large membership
- **ALMC** – At-large Membership Committee
- **ALOC** – At-large Organizing Committee
- **ALSC** – At-large Study Committee
- **APNIC** – Asia-Pacific Network Information Center
- **ARIN** – American Registry for Internet Numbers
- **ARPA** – Advanced Research Project Agency (U.S.)
- **ASO** – Address Supporting Organization
- **BM** – Board meeting (minutes)
- **BMWG** – Barcelona/Monterrey/Washington Group
- **BWG** – Boston Working Group
- **ccNSO** – Country-code Name Supporting Organization
- **ccTLD** – country-code top-level domain
- **CDNCC** – Canadian Domain Name Consultative Committee

- **CDT** – Center for Democracy and Technology
- **CENTR** - Council of European National Top-Level Domain Registries
- **CERN** – Centre Européen pour la Recherche Nucléaire (Switzerland)
- **CIRA** – Canadian Internet Registration Authority
- **CORE** – (Internet) Council of Registrars
- **DARPA** - Defense Advanced Research Projects Agency
- **DN** – domain-name
- **DNS** - Domain Name System
- **DNSO** - Domain Name Supporting Organization
- **DNSO GA** – DNSO General Assembly
- **DNSO NC** – DNSO Names Council
- **DoC** – Department of Commerce
- **EC** – European Commission
- **EFF** – Electronic Frontier Foundation
- **ERC** – Evolution and Reform Committee
- **EU** – European Union
- **FCC** – Federal Communications Commission (U.S.)
- **FNC** – Federal Networking Council (U.S.)
- **G7** – the Group of Seven
- **GAC** – Governmental Advisory Committee
- **GAO** – General Accounting Office (U.S.)
- **GATS** – General Agreement on Trade and Services
- **GII** – Global Information Infrastructure

- **GIIC** – Global Information Infrastructure Commission
- **GIP** – Global Internet Project
- **GIS** – Global Information Society
- **GNSO** – Generic Names Supporting Organization
- **gTLD** – generic top-level domain
- **gTLD-MoU** – Generic Top-level Domain Memorandum of Understanding
- **HTML** – hypertext markup language
- **HTTP** – hypertext transfer protocol
- **IAB** – Internet Activities/Architecture Board
- **IAHC** – Internet Ad Hoc Committee
- **IANA** - Internet Assigned Numbers Authority
- **ICANN** - Internet Corporation for Assigned Names and Numbers
- **IDNs** – internationalized domain names
- **IDNHC** – Individual Domain-name Holders Constituency
- **IEEE** – Institute of Electrical and Electronics Engineers
- **IETF** - Internet Engineering Task Force
- **IFWP** – Internet Forum for the White Paper
- **INTA** – International Trademark Association
- **IP** - internet protocol
- **IPC** – Intellectual Property Constituency
- **IPTO** – Information Processing Techniques Office (U.S.)
- **ISI** – Information Sciences Institute (Southern California University, U.S.A.)
- **ISO** – International Standards Organization

- **ISOC** – Internet Society
- **ISP** - Internet Service Provider
- **ITU** – International Telecommunications Union
- **MAI** – Multilateral Agreement on Investment
- **MAC** – Membership Advisory Committee
- **MoU** – Memorandum of Understanding
- **NAIS** – National Association of Independent Schools
- **NCM** – (DNSO) Names Council meeting (minutes)
- **NIC** – Network Information Center
- **NII** – National Information Infrastructure (U.S.)
- **NRC** – National Research Council (U.S.)
- **NSF** – National Science Foundation (U.S.)
- **NSI** - Network Solutions, Inc.
- **NTIA** – National Telecommunications and Information Administration (U.S.)
- **OECD** – Organization for Economic Cooperation and Development
- **ORSC** – Open Root Server Confederation
- **PDP** – Policy Development Process
- **PF** – Public Forum (scribe's notes)
- **PSO** – Protocol Supporting Organization
- **RALOs** – Regional At-large Organizations
- **RFC** – Request for Comments
- **RIPE** – Réseaux IP Européens
- **RIRs** – Regional IP address Registries

- **SOs** – supporting organizations
- **SRS** – Shared Registration System
- **SSAC** – Security and Stability Advisory Committee
- **TAC** – Technical Advisory Committee
- **TF** – task force
- **TFF** – Task Force on Funding
- **TLD** - top-level domain
- **TM** – trademark
- **TCP** – transmission control protocol
- **UDRP** – Uniform Dispute Resolution Policy
- **URL** - uniform resource locator
- **WG** – working group
- **WGIG** – Working Group on Internet Governance
- **WIPO** - World Intellectual Property Organization
- **WSIS** – World Summit on Information Society
- **WTO** – World Trade Organization
- **WWW** – World Wide Web

Appendix B

Questionnaire for structured interviews

with ICANN members

Personal data of the interviewee:

- Introduce yourself: name, age, education, and country of residence.
- Which organization/firm do you represent in ICANN?
- What is your professional position at that organization/firm?
- How long have you been participating in ICANN's activity and in what capacity?
- You are a member of which DNSO constituency?

Research questions	**Interview questions**	**Additional interview questions (to trigger more detailed answers)**
Questions concerning the collaborative process: 1. ICANN's formative stage:		
1.1. How was ICANN initiated and organized?	- How did your organization/firm become involved with ICANN?	- In your view, why was your organization invited (if that's the case) to join ICANN? - Why was your organization interested in joining ICANN?
	- How did you become a participant in ICANN's process (a member of the Board, or the DNSO Names Council, or a Working Group, etc.)?	- In your view, why was it decided that you would represent your organization in ICANN (if that's the case)? (personal credentials: expertise, leadership qualities, previous experience with

		collaborative decision-making, etc.) - What were your initial expectations of ICANN, the collaborative process, and your participation in the decision-making?
1.2. How are the initial stakeholder positions perceived (as advantageous or disadvantageous)?	- In your opinion, who were the convenors of the ICANN collaborative formation? What were their stakes in the process?	- In your view, who were the leading figures in ICANN's formative stage, and in what respect (possessing a high level of expertise, dominating personalities, leadership qualities, or structural power)?
<u>2. ICANN's collaborative stage:</u>		
2.1. How is the collaborative process conducted?	- What is your overall impression/feeling of ICANN's functioning?	- How would you qualify the collaborative work: as pleasant – unpleasant, easy – difficult, productive – unproductive, etc.? - For you, are there any sources of frustration in the collaborative process? (Specify what and why!) - Conversely, are there any sources of gratification for you? Is your participation in ICANN a motivating experience? Why?
	- In your view, what are the strongest and the weakest sides of ICANN's collaborative process?	- What are the factors that contribute to ICANN's success? (selection of participants; clear, achievable objectives; strong organizational rules and leadership; etc.)

		- What are the factors that constrain the realization of ICANN's full potential (as designed by the constitutive documents)? - In your view, have there been any successfully resolved policy issues in ICANN? (Specify your understanding of "successful policy", recall specific meetings, and state the reasons for success!) - Have there been any failures? (Specify the policy issues, recall specific meetings, and define the reasons for failure!)
2.2. How do the stakeholders perceive the collaborative process' power dynamics?	- Are you satisfied by the way the agenda is generated in ICANN?	- In your view, new agenda items have been suggested, usually, by whom/which structural unit? - Do you think that any important DNS policy issues have been neglected due to this way of agenda setting? If so, specify what and why.
	- In your assessment, does the way, in which stakeholder positions on substantive issues are communicated comply with the principles of openness and transparency?	- Are the communicative forms used to generate ideas on new policy issues sufficient and effective? (website, online public discussions, shat rooms, in person meetings, General Assembly meetings, etc.) If not, explain why and give examples. - Is the articulation of a new policy (formulation of

		ideas, wording) an object of consensus building? If not, who prepares the discussion papers?
	- In your view of ICANN, is the decision-making power fairly distributed among the stakeholders and structural levels?	- If that's the case, have you been successful in making your voice heard on a particular issue? (Specify!) - When you try to influence the decision-making process, what strategy do you use? What are the other stakeholders' strategies? - In your view, are there stakeholder groups (constituencies) in a position to strongly influence the collaborative process? If so, why? - Are you content with the following features of the decision-making process: its pace and scope, level of transparency and efficiency? If not, who do think are the responsible parties? - In your view, is ICANN an independent decision-making body? If not, what are the outside forces that attempt to influence ICANN's functioning? (Specify in which instances and in what way?)
2.3. How is consensus achieved on policy issues?	- Does ICANN satisfy your understanding of a consensus-based decision-making body?	- Do you think that all stakeholders have an equal opportunity to participate in the collaborative process?

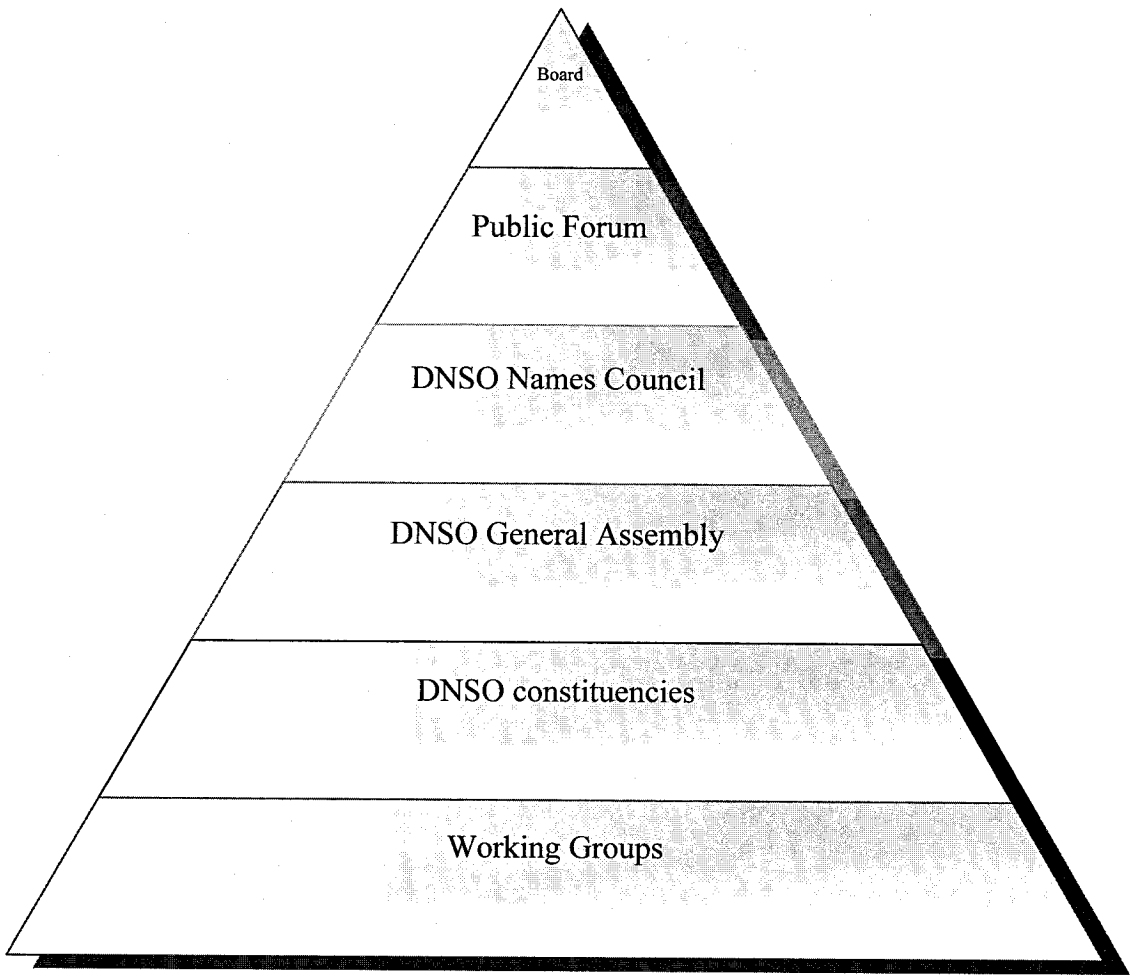
		- Has the principle of equality always been respected, or there have been attempts to dominate the process on behalf of particular stakeholders? (If so, specify which members, how, and in which particular cases.) - Are there stakeholders that have not been intervening enough in the collaborative process? In your view, what are the reasons?
	- In your view, have ICANN stakeholders been able to reach any consensus?	A/ If yes, on which issues? B/ If not, why? Has there been a limited consensus resultant from the collaborative process? On which issues?
	- In your assessment, what are the factors contributing to consensus achievement in ICANN?	- Do you think there is a broad stakeholder agreement on ICANN's objectives? (objectives: to assure Internet's stability, and introduce competition in the domain name markets)
Questions concerning the outcomes of the collaborative process: 1. What is the impact of consensus achieving on the Internet DNS development?	- What have been the most controversial issues in the process of consensus building?	- What has been your (your organization's) position on the disputed issues? - Have you succeeded in convincing other participants in your position? How? - Have you had to compromise your initial

		position on disputed issues? (Give examples and specify why, in what circumstances.)
	- Does the Internet DNS policy emerging from the consensus-based decision-making in ICANN satisfy your expectations?	- What would have been the "ideal" Internet DNS policy in terms of your (your organization's) interests?
2. How is ICANN emerging as a power production site through learning and innovation?	- Have you learned any thing new during your participation in ICANN's activity? (Specify in which area.)	- What factors have contributed to learning? (interaction with other stakeholders; shared expert knowledge; discussion papers; etc.)
	- Are you more familiar now with the other participants' positions on the Internet DNS policy, than at the beginning?	- Are there stakeholders in ICANN with which you have developed closer contacts since the beginning of the collaborative process? If yes, specify which ones, and why.
	- Do you have the impression that since your involvement with ICANN, you have been interacting differently with organizations from other sectors?	- If yes, how could you describe the difference?
	- Have you observed any evolution in the stakeholders' vocabulary (definitions, notions, neologisms, etc.) through ICANN's functioning?	- Has your vocabulary changed as a result of your participation in ICANN? If yes, now?
	- In your view, is the ICANN collaborative process leading to innovations?	- Would you call the particular DNS policies that ICANN has designed so far "innovative"?

		- Do you think that the consensus-based collaborative process, itself, is an innovation?
	- Overall, do you think that ICANN has already gained authority in the Internet DNS governance?	- If yes, what are the factors contributing to this result? (global representation, multistakeholder collaborative design, consensus-based policies, etc.) - If not, what are the constraining factors? (lack of accountability, transparency, and openness; collaborative process dominated by particular stakeholders; etc.)
Concluding questions: 1. What is the correlation between the level of involvement in ICANN and the perception of power dynamics?	- Have you personally attended any meeting?	- If yes, what, in particular, and how did this experience influence your participation in ICANN? Why? - If not, what is the reason?
	- Do you regularly participate in ICANN's online discussions/chats?	- If yes, in which forms, in particular, and has it been a pleasant, successful experience?
	- How can you define your overall attitude towards ICANN? (positive, negative, constructive)	- When you talk/write about ICANN, what images or metaphors do you use? Why?
	- If ICANN were to be launched again, what should be done differently?	- Which of these qualities of the collaborative process would you suggest to be improved: efficiency, or transparency and accountability?

Appendix C

Policy-making levels in ICANN



Appendix D

ICANN participants: list of interviewees – round 1

(in chronological order)

Name	Official position in ICANN (at the time of the interview)	Affiliation	Date of the interview
Mike Roberts (U.S.A.)	Interim President and CEO		February 20, 2002
Esther Dyson (U.S.A.)	Interim Chair of the Board	Chairman, EDventure Holdings; writer	March 17, 2002
Jonathan Cohen (Canada)	Board Member, representing Intellectual Property Constituency		March 19, 2002
Andy Mueller-Maguhn (Germany)	Board Member, representing the At-large Membership for Europe		April 17, 2002
Stuart Lynn (U.S.A.)	President and CEO		April 19, 2002
Frank J. Fitzsimmons (U.S.A.)	Interim Board Member		April 22, 2002

Antonio Harris (Argentina)	DNSO Names Council Member, representing ISP and Connectivity Provides constituency		April 22, 2002
Milton Mueller (U.S.A.)	DNSO Names Council Member, representing Non-Commercial Domain Name Holders constituency	Professor, Syracuse University	May 1, 2002
Youn Jung Park (South Korea)	The DNSO Names Council Member, representing the Non-Commercial Domain Name Holders constituency		May 3, 2002
Karl Auerbach (U.S.A.)	Board Member, representing the At-large Membership for North America		May 3, 2002
Oscar Alejandro Robles-Garay (Mexico)	DNSO Names Council Member, representing ccTLD Registries constituency	Director General Top Level Domain .MX	May 23, 2002

Philip Sheppard (UK)	DNSO Names Council Chairman, representing Commercial and Business Entities constituency	AIM – European Brands Association	May 31, 2002
Alejandro Pisanty (Mexico)	Vice-Chairman of the Board	Director General de Servicios de Computo Academico UNAM, Universidad Nacional Autonoma de Mexico	July 4, 2002
Stephen Crocker (U.S.A.)	Chair, Security and Stability Advisory Committee		July 20, 2002
Vinton Cerf (U.S.A.)	Chairman, Board of Directors		August 5, 2002

Appendix E

Decision units

for the analysis of the ICANN process

Substantive-policy issues	Organizational issues
1/ Registrar Accreditation Policy 2/ Uniform Dispute Resolution Policy 3/ New gTLD Registry Creation Policy 4/ Internationalized Domain-names Policy 5/ Security and Stability Policy	6/ At-large Membership Policy 7/ DNSO Policymaking Process 8/ Contractual Relations with the ccTLD Operators 9/ ICANN Evolution and Reform

Appendix F: List of codes and first pages of *HyperResearch* reports

```
_____ REPORT HEADER _____
This Report is on the following codes:
      comm  globaloutreach
      comm  media
      comm  pubmeet
      comm  web
      comm transpar
      consensus
      DNS  agenda
      DNS  ownership
      IANA
      ICANN  agenda  suggested
      ICANN  critics
      ICANN  history
      ICANN  mandate
      ICANN  meetings
      ICANN  metaphors
      ICANN  powers
      ICANN  process
      IETF
      IFWP
      learning
      org  ASO
      org  board  elect
      org  board  meetings
      org  board  NC
      org  board  SOs
      org  board  staff
      org  bylaws
      org  constit  AOI
      org  constit  board
      org  constit  MOU
      org  DNSO  constits
      org  DNSO  GA
      org  DNSO  NC
      org  DNSO  NC  WGs
      org  DNSO  review
      org  finances
      org  intern  policies  IR
      org  intern  policies  reconsid
      org  intern policies COI
      org  PSO
      org  SHs
      org  SHs  ALM
      org  SHs  ALM  history
      org  SHs  ALM  study
      org  SHs  ALMstudy  history
      org  SHs  ccTLDs
      org  SHs  global
      org  SHs  NSI
      org  SHs  rootservopers
      org  SHs committee
      org  staff
      org  struct  ACs
      org  struct  ACs  audit
      org  struct  ACs  GAC
      org  struct  ACs  IRAC
```

REPORT HEADER

This Report is on the following codes:

comm globaloutreach
comm media
comm pubmeet
comm web
comm transpar
consensus
DNS agenda
DNS ownership
IANA
ICANN agenda suggested
ICANN critics
ICANN history
ICANN mandate
ICANN meetings
ICANN metaphors
ICANN powers
ICANN process
IETF
IFWP
learning
org ASO
org board elect
org board meetings
org board NC
org board SOs
org board staff
org bylaws
org constit AOI
org constit board
org constit MOU
org DNSO constits
org DNSO GA
org DNSO NC
org DNSO NC WGs
org DNSO review
org finances
org intern policies IR
org intern policies reconsid
org intern policies COI
org PSO
org SHs
org SHs ALM
org SHs ALM history
org SHs ALM study
org SHs ALMstudy history
org SHs ccTLDs
org SHs global
org SHs NSI
org SHs rootservopers
org SHs committee
org staff
org struct ACs
org struct ACs audit
org struct ACs GAC
org struct ACs IRAC

```
org  struct  ACs  recons
org  struct  ACs  RSSAC
org  struct  SOs
org  struct  SOs  DNSO
SHs  Microsoft
subs  alternroots
subs  ccTLDs  agrs
subs  ccTLDs  agrs  history
subs  famousmarks
subs  internDNs
subs  internDNs  history
subs  market  registrars
subs  market  registries
subs  newRIRs
subs  newTLDs
subs  newTLDs  history
subs  numbering
subs  rootSSE
subs  UDRP
subs  UDRP  history
subs  WHOIS
subs ENUM
USG
USG  history
WIPO  recomm
_____ (End list of codes)
_____ END OF HEADER _____
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This Report is on the following codes:
DNS agenda
_____ (End list of codes)
_____ END OF HEADER _____

The actual report follows:
Case, Code, Frequency, Type, Reference,
case 57, DNS agenda, 2, TEXT, char 1609 to 2057 of page 1 of 19990527 GAberlin,
Source Material: Work Items for the DNSO

Those present were asked to suggest potential work items for the DNSO. In order that important issues could be addressed quickly, volunteers were requested to become the focal point for any wishing to contribute work or ideas on the issues identified. It was stressed that the list was not exhaustive but would help to initiate work and of which progress could be reported at the next General Assembly of the DNSO in Chile.

case 57, DNS agenda, 2, TEXT, char 2506 to 3259 of page 1 of 19990527 GAberlin,
Source Material: Registry/registrar issues: Bill Semich <bill@mail.nic.nu>

Bylaws: Bill Semich <bill@mail.nic.nu>

Jon Englund <jenglund@itaa.org>

New TLDs: Simon Perry <simon.perry@idr.co.uk>

Outreach and DNSO awareness: Jorek Kamel <tkamel.idsc.gov.eg>

Global diversity: Kilnam Chon <chon@cosmos.kaist.ac.kr>

Security/stability of the root server/Y2k:Osten Franberg
<osten.franberg@lme.ericsson.se>

Definition of constituencies: John Lewis <john.c.lewis@bt.com>

Business plan fro DNSO: Javier Sola <jsola@aui.es>

DNSO Work processes: Antony van Couvering <avc@interport.net>

Liaison with other SOs: Roberto Gaetano <roberto.gaetano@etsi.fr>

ccTLD contracts: CENTR (Fay) already facilitate a work group lead by Marcel Schneider of SWITCH (.CH) <c-wg@centr.org>

case 58, DNS agenda, 2, TEXT, char 7522 to 8636 of page 1 of 19990527 NCberlin,
Source Material: Theresa - There are two types of things we need to consider procedural, and substantive. On the procedural side, we have outreach, communications, and so on. Substantively, though, which issues are most important?
Antony Van Couvering - New TLDs in the root, and the WIPO report
Fay Howard - the Y2K problem
Osten Franberg - Stability is important [General discussion about how this could be a problem for the root server committee]
Bill Semich - It's not limited just to root servers, it has to do with all the TLD roots as well

This Report is on the following codes:
subs newRIRs
subs numbering
subs rootSSE
subs ENUM
_____ (End list of codes)
_____ END OF HEADER _____

The actual report follows:
Case, Code, Frequency, Type, Reference,
case 48, subs newRIRs, 1, TEXT, char 7761 to 12189 of page 1 of BMSN 04 06 01,
Source Material: Emerging Regional Internet Registries

1. Resolution
2. Wilson: "Sufficient resources within the authorized & approved budget."

¥ Cerf: Can't break the budget.

3. Fockler: Put this on the table.
4. Campos: Request a change to language of second resolution. If we have a set of standards for new RIRs, that should be it. Should be clear that president is not authorized to modify rules on the fly.

¥ Lynn: Difficult subject. Want to clarify language. Language is intended to apply (only) to transition process, not to RIRs' ongoing operations (which is governed by MoU and their internal processes). Everyone wants a transition that works well.

¥ Cerf: Note that language says "for receipt" and "for evaluation."

¥ Campos: There is a different document that talk about criteria for establishing new RIRs. Understand the need for clarity here. But this text suggests that the president and staff might add new criteria as a result of this resolution.

¥ McLaughlin: Emerging RIR document is not a simple checklist. This is the first time we've added new RIRs in this way. Some modifications along the way may be necessary. Agree with principle that new requirements can't be added midway through the process.

¥ Abril i Abril: Understand the concern here. Need clarity here.

¥ Pisanty: Only problem here is clarity in language.

¥ Fockler: Agree with Pisanty. Not giving staff the ability to create new criteria.

¥ Touton: Removing ability to have articulated standards would make it impossible to approve RIRs. Criteria are detailed, but judgment required to decide whether or not criteria were met. ICANN should be able to state, in a transparent way, what will meet the criteria.

¥ Auerbach: We should do what we can to move forward with new RIRs. Need to give staff flexibility here.

¥ Blokzijl: Just language. Read it differently today than yesterday. Says standards for procedures - what sort of paperwork to use.

¥ Campos: Board should be concerned about the message here. No criteria used for creation of initial RIRs. New RIRs needed in Latin America and Africa. Now, rules & criteria. Intention is good. Let's say that this applies to transition only.

Appendix G

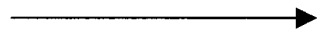
Chronological map

of the policy-making in ICANN

(in discussion units)

Year / Decision units	1999	2000	2001	2002
Substantive-policy issues				
1/ Registrar Accreditation Policy	January 1999 – April 2000 →			
2/ Uniform Dispute Resolution Policy	June 1999 – July 1999 →			
3/ Famous Trademarks Protection	June 1999 – July 2000			

	→
4/ New gTLD Registry Creation Policy	June 1999 – November 2000 →
5/ Internationalized Domain-names Policy	August 2000 – October 2003 →
6/ Security and Stability Policy	November 2001 – in progress

	
Organizational issues	
6/ At-large Membership Policy	November 1998 – August 2001 
7/ Policy on consensus-building in the DNSO	June 1999 – January 2001 
8/ Policy on contractual relations with the ccTLDs	Spring 1999 – June 2003 
9/ ICANN	February 2002 – December 2002

Evolution and Reform Policy	

Appendix H

The ICANN stakeholder map: orbits of Influence

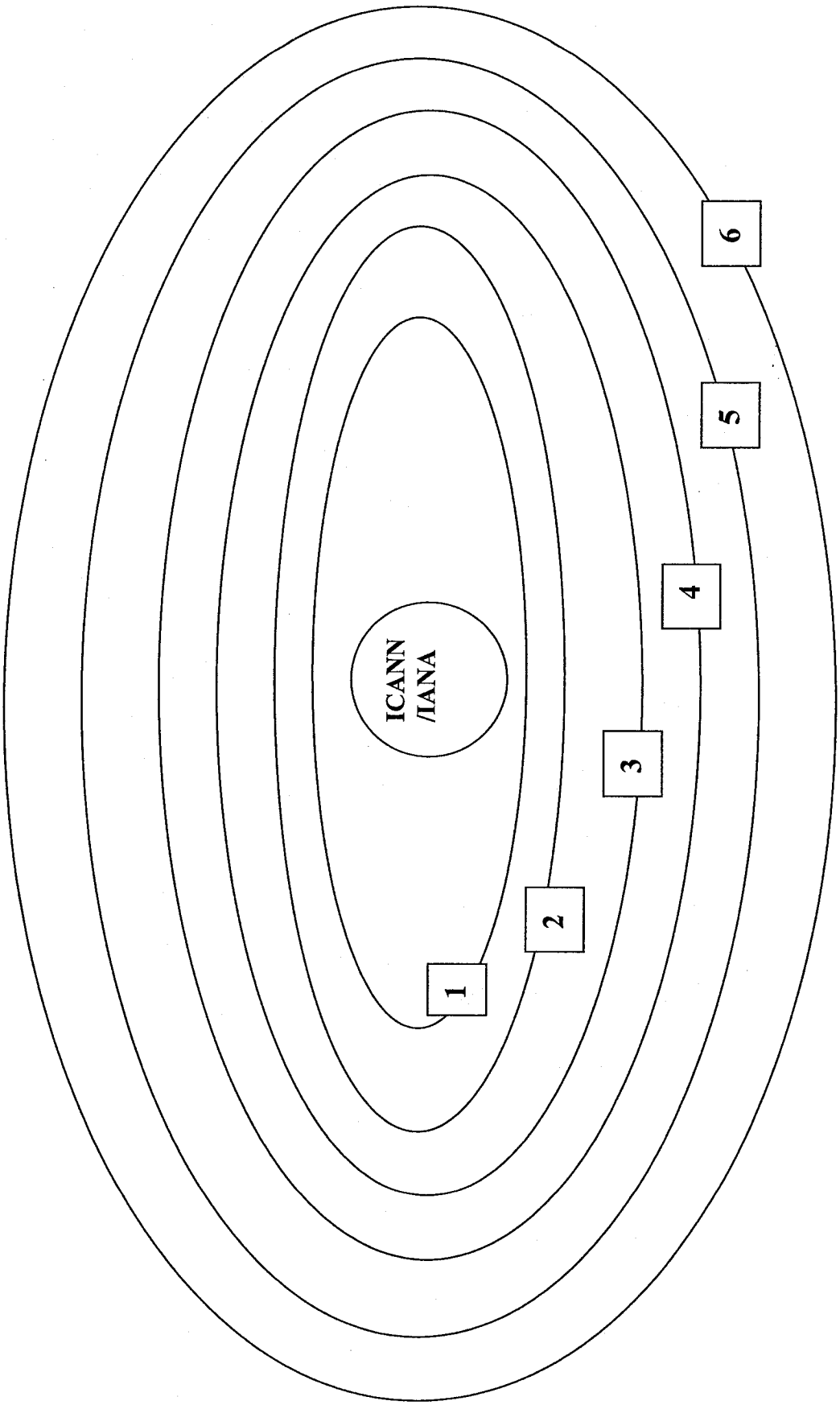
Legend:

No. of the orbit of influence	Stakeholders	Stakes/interests
1/	Internet Technical Community encompassing the original ARPANET elite, the IANA, the IAB, and the IETF.[437]	- to maintain its historical control over the Internet's name and address spaces; - DNS management as a source of support for its activities.
2/	Operators of RIR's and ccTLDs as designated by IANA/Postel – geographically and administratively diverse group.	- interested in preserving their own independence - from ICANN in terms of designing local policies, or from the national governments; - used funding requirements as leverage in the negotiations with ICANN.
3/	Trademark and Intellectual Property Interests assembled in representative groups (the WIPO	- opposed expansion of the name space and demanded more effective and inexpensive ways to monitor domain name assignments and

[437] Milton Mueller (2002) points out that this group overlaps with research and education networking organizations, and large telecommunications and e-commerce corporations (166).

	as an international umbrella).	enforce their claims of exclusive rights over specific names.
4/	Network Solutions, Inc., gTLD Registries, and local and regional Internet Service Providers: business entities that developed the domain name market.	- NSI, as controlling two-thirds of the global market for domain name registration, wanted to establish stable property right over its gTLDs, or prolong its special market position as long as possible; - gTLD Registries wanted competitive entry into the market; - ISPs desired both a stable, accountable assignment authority and participation in the policymaking process.
5/	National Governments as represented in the GAC and Intergovernmental Organizations: included the ITU and the WIPO.	- interested in asserting rights over specific names (ccTLDs) and registries; - wanted to secure their presence in the Internet regulation process.
6/	Civil Society and Civil Liberties Organizations: included DNRC, EFF, CPSR, ACM, ACLU.	- saw in the trademark protection policies threats to freedom of expression and a dangerous expansion of intellectual property rights.

Based on Mueller's (2002) description of the stakeholder interest groups in Internet Governance (166 – 167).


ICANN
/IANA
1
2
3
4
5
6

Appendix I

Generic top-level domains: sponsors and accredited registries

- The .aero domain is reserved for members of the air-transport industry and is sponsored by Société Internationale de Télécommunications Aéronautiques (SITA).
- The .biz domain is restricted to businesses and is operated by NeuLevel, Inc.
- The .com domain is operated by VeriSign Global Registry Services.
- The .coop domain is reserved for cooperative associations and is sponsored by Dot Cooperation LLC.
- The .info domain is operated by Afilias Limited.
- The .jobs domain is reserved for human resource managers and is sponsored by Employ Media LLC.
- The .museum domain is reserved for museums and is sponsored by the Museum Domain Management Association.
- The .name domain is reserved for individuals and is operated by Global Name Registry.
- The .net domain is operated by VeriSign Global Registry Services.
- The .org domain is operated by Public Interest Registry. It is intended to serve the noncommercial community, but all are eligible to register within .org.
- The .pro domain is restricted to credentialed professionals and related entities and is operated by RegistryPro.

- The .travel domain is reserved for entities whose primary area of activity is in the travel industry and is sponsored by Tralliance Corporation.
- The .gov domain is reserved exclusively for the United States Government. It is operated by the US General Services Administration.
- The .edu domain is reserved for postsecondary institutions accredited by an agency on the U.S. Department of Education's list of Nationally Recognized Accrediting Agencies and is registered only through Educause.
- The .mil domain is reserved exclusively for the United States Military. It is operated by the US DoD Network Information Center.
- The .int domain is used only for registering organizations established by international treaties between governments. It is operated by the IANA .int Domain Registry.

Source: IANA; http://www.iana.org/gtld/gtld.htm

Appendix J

The evolving e-commerce and Information Society governance (1994 – 1998)

- In July 1994, at the G7[438] leaders meeting in Naples, following a proposal by the U.S. President to organize a ministerial meeting on the "Information Highway" vision, a special program for the implementation of the Global Information Society was established, under the auspices of G7. Overall, as Bayne points out, the G7 summits of the 1990s, from Naples 1994 onwards, "recognized globalization as a powerful, all-embracing force, with benefits as well as dangers" (Bayne, 1999, 26).
- In December 1994, the European Commission launched the Internet Society Project Office as the coordination center of all Information Society activities, based on the reached agreement that the private sector had to be the driving force behind the initiatives.
- In February 1995, acting on Clinton's proposal, the ministers of industry and telecommunications gathered in Brussels for the first G7 summit on building the

[438] The Group of 7 (G7) is a coalition of the major industrial democracies: the UK, France, Germany, Italy, Japan, and the U.S., and Canada (joined in 1976). In 1998, Russia joined the group, and it became G8 (http://encyclopedia.thefreedictionary.com/G7). In the specialized literature, G7/G8 is often described as "secretive and unforthcoming", as it does not have a public relations department, and information service or a web site (Bayne, 1999, X). Although G7 is an informal international organization, it has established itself as the emerging centre of global governance for the new millennium, as "its core values of a market economy and democratic polity have now acquired a global predominance" (Kirton, 1999, 46). Hodges characterizes G7/G8 as "a closed international club of capitalist governments trying to raise consciousness, set an agenda, create networks, prod other institutions to do things that they should be doing..." (Hodges, 1999, 69).

Information Highway. At that meeting, the first significant G7 initiative on e-commerce emerged with the creation of the Global Information Infrastructure Commission (GIIC).[439] The ministers reached consensus on eight guiding principles[440] and eleven items for pilot projects. A strong message was sent by the G7 ministerial meeting that governments had to reshape the international regulatory framework in areas such as copyright protection, data privacy and antitrust rules, and to promote compatible standards. In a *Reuters* report from the conference, it was noted that "[t]he G7 showed no inclination to create any new structures to deal with these issues...", but "...called on existing international bodies such as the World Trade Organization, International Telecommunications Union and the Organization for Economic Cooperation and Development to take up the battle" (http://www.di.unito.it/mail-archive/G7/0015.html).

- In May 1996, an Information Society and Development Conference was convened in Midrand, South Africa, organized by G7 as a follow up of the 1994-Brussels meeting. Representatives of around 40 countries, the EU and 17 other international organizations were invited to participate. Focusing on challenges that the developing countries faced in their attempts to integrate in the

[439] Launched as an independent nongovernmental entity, the GIIC works with national governments, industry groups, and international organizations "to advance the dialogue on rules needed for the global information economy... The GIIC argues that the G8 should work with the private sector and with international organizations such as the WTO, the World Intellectual Property Organization, the OECD, and UNCITRAL to create cooperative systems for e-commerce regulation and promotion" (Lawton, 2001, 54-55). The GIIC has been encouraging the removal of barriers to e-commerce in countries such as India, China and Venezuela. It has also been working with a coalition of businesses in 140 countries to urge governments to rely on e-business self-regulation.

[440] The first three principles comply with the neo-liberal emphasis on trade liberalizations: 1/ to promote dynamic competition; 2/ to encourage private investment; and 3/ to define an evolving regulation framework. The rest of the principles comply more with the European Information Society vision, as some "public interest" aspects are covered: 4/ to guarantee an open access to the network; 5/ to guarantee universal access to the network; 6/ equality of opportunities among citizens to be promoted; 7/ content diversity, comprising of cultural and linguistic diversity; and 8/ to meet the need of world cooperation, as well as, with the less developed countries.

Information Society project, the conference concluded that the technological gap between the industrialized and developing worlds was "daunting".

- In October 1997, the G7 representatives discussed four major issue areas under the conference title "Building the Global Information Society for the 21st Century". The areas were: 1/ doing business on global information networks; 2/ experiences and expectations; 3/ services for the public; and 4/ communications infrastructure requirements. Some serious value discrepancies reemerged between the U.S. and the EU. The Clinton Administration supported, for instance, government controlled encryption methods, designed to allow the equivalent of "wire-tapping" personal data transmission, and the EU strict privacy data protection directives met the U.S. opposition.
- Between 1995 and 1998, the Multilateral Agreement on Investment (MAI) was being negotiated between the 29 OECD-member states and the European countries. Based on the U.S.-promoted platform of "investment liberalization and investor protection", the project prompted growing international dissent and civil society opposition. In October 1997, the new French government announced its withdrawal from the MAI negotiations citing conflicts with national sovereignty and protection of French culture industries. In December 1998, OECD announced that the negotiations on MAI were no longer taking place. Only a few months earlier (October 1998), at the Ottawa Ministerial Conference on Electronic Commerce, the OECD redirected its efforts to areas already well under development in other international entities, such as G7 and EU (see OECD, 1998).

- In July 2000, at the G7 summit in Okinawa, Japan, where a Charter on Global Information Society was adopted, an agreement to work together in maximizing the benefits and the global dissemination of information technology was achieved. Digital Opportunity Task Force (Dot-Force) was established to formulate recommendations on global action to bridge the international information divide (see Lawton, 2001, 54-55).

Appendix K

DNSO constituency creation: timeline

- May 27, 1999 – provisional recognition of six constituencies until November 4, 1999
- August 26, 1999 – provisional recognition of the Non-commercial Constituency
- September 15, 1999 – amended constituency proposals submitted to the Board
- October 8, 1999 – constituencies elect permanent Names Council members
- October 16, 1999 – fully-constituted Names Council select Board members