



## Comments of the Internet Governance Project on the ICANN transition

The Internet Governance Project (IGP) welcomes the opportunity to comment on the future of the U.S. government's relationship to ICANN.<sup>1</sup> (Notice of Inquiry "Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System," Docket No. 090420688-9689-01.) IGP is the leading independent analyst of global Internet governance processes. It is a transnational alliance of academics with expertise in global governance, Internet policy, and information and communication technology. Our research and advocacy upholds the values of a global and free Internet, individual human rights and democratic governance.

### Summary

*"The global challenges we face demand global institutions that work."*

– President Barack Obama, 2008

ICANN lacks accountability and its processes are full of problems, but the JPA is not the right tool to use to fix them. The JPA contributes to ICANN's failings. Although it was intended to provide a vehicle for impartially assessing the adequacy of ICANN's legal and institutional framework for the global Internet, in reality it does nothing but invite the stakeholders in one privileged country to complain to their own government about policy outcomes they don't like. The U.S. government needs to let the JPA expire, and immediately initiate an international agreement that formalizes and completes the transition of ICANN to a stable form of multi-stakeholder global governance rooted in a nonprofit corporation. This international instrument should be used to provide a shared, global legal framework that can keep ICANN independent but accountable. It should be designed to keep ICANN focused on its narrow coordinating mission, to restore internal accountability of the Board to its membership, to check abuses by ICANN's Board, to delegate authority over ccTLDs to national governments, and to limit interference in or abuse of ICANN by governments. By taking the lead, the US can gain buy-in from other governments for its own model and ensure that the transition does not harm any of its own legitimate interests. But to succeed in completing the transition, the U.S. will have to win the acceptance of a critical mass of other countries and peoples.

### Review of past proceedings

This is the third time NTIA has asked for public comment on the progress of ICANN and the status of its "transition." It is worthwhile to review the entire record and to place IGP's comments in that context.

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<sup>1</sup> Contributors from the Internet Governance Project concurring on this statement include Dr. Milton Mueller, Brenden Kuerbis, Dr. Michel van Eeten, Dr. John Mathiason, Dr. Derrick Cogburn, Dr. Lee McKnight.

In your 2006 proceeding, IGP led an international campaign to remind the U.S. Commerce Department that “The Internet's value is created by the participation and cooperation of people all over the world...therefore no single Government should have a pre-eminent role in Internet governance.” This message received strong support both inside and outside the U.S., with hundreds of individuals and organizations expressing support for it in your proceeding.

In that proceeding, as in the current one, DoC asked whether the White Paper principles were still relevant. IGP affirmed that the four White Paper principles were still relevant, as did most other comments. We noted that the problems with ICANN center on the implementation of the principle of “private, bottom-up coordination.” We pointed out that U.S. unilateral supervision of ICANN is inconsistent with that principle. We also called for adding two new principles: a formal recognition of the importance of freedom of expression as a constraint on ICANN’s action, and a commitment to some form of external accountability. As milestones for a new agreement, we asked that ICANN be expected to recognize and implement those two new principles.

The 2006 proceeding led to a shift in the format of U.S. oversight, from the original Memorandum of Understanding to a “Joint Project Agreement.” This seems to have been a way of recognizing the demand for a more autonomous ICANN that would eventually move to a situation where no JPA was necessary. Unfortunately, free expression was not formally recognized as a relevant principle of the new JPA, but accountability was.

In your 2008 mid-term review of the JPA, we commended ICANN on its progress in transparency and contended that external accountability is still the main problem with ICANN. We called for expiry of the JPA but proposed to replace it with “new forms of accountability rooted in the global Internet community.” Five (5) specific reforms were proposed that could be undertaken by Sept, 2009 as *condition* for release from JPA:

- a. Enable a vote of no confidence by ICANN’s Supporting Organizations
- b. Execute the GNSO reforms proposed by the London School of Economics report
- c. Reform the Independent Review Process to follow the recommendations of the OneWorld Trust report
- d. Support a staff/secretariat for the Board that is independent of the one maintained by ICANN’s CEO
- e. Perform a bi-annual “soft” review of ICANN using the UN Internet Governance Forum

## **Where we stand now**

First, we note that none of the five accountability-related reforms called for in our mid-term review comments have been implemented by ICANN. There is progress in only two of these areas: 1) ICANN has taken steps to reform the GNSO along the lines suggested by the LSE Report; and 2) ICANN’s Presidential Strategy Committee has proposed (only a few days before the comment deadline) a slightly strengthened Independent Review Tribunal. None of these reforms are implemented yet, and there is, at the time of this writing, still a danger that the GNSO reforms could be undermined or derailed.

Second, the current NOI asks once again whether the four principles from the 1998 White Paper are still appropriate, and also asks whether they been effectively integrated into ICANN's processes and structures. To this we answer: the principles are still appropriate, but ICANN's processes and structures still do not adequately deliver private, bottom-up policy making and coordination, and this problem is directly related to its lack of external accountability. (We discuss this in more detail in the "Diagnosis" section below)

Third, we still believe that a new principle regarding freedom of expression *must* be added to ICANN's mission. Such a principle constitutes an essential protection against possible abuses by a privatized ICANN or by governments impinging on ICANN. The nexus between freedom of expression and domain name and IP address management has grown in recent years, as is evident from the new gTLD process, which attempts to regulate the content of both the namespace and the websites using new TLDs, and by other recent developments.

Fourth, it is clear that most of the interest groups supporting an extension of the JPA are concerned not with the adequacy of ICANN's legal and institutional framework for the global Internet, but with policy outcomes they don't like. For example, trademark protection lobbyists are unhappy with the new gTLD proposal and oppose expiration of the JPA for that reason; some registrars are unhappy with its decisions about their competitors. Other comments in this proceeding view ICANN as an instrument of U.S. national security policy, when in fact it is supposed to be responsible for the global public interest and accountable to the entire Internet community. This indicates to us that the JPA process is inherently broken as a method of improving the framework under which ICANN operates.

## **Diagnosis**

Clearly, the persistent problems still center on accountability and the bottom up principle. On that dimension ICANN is not improving. Its policy making processes are still too makeshift and unstable. There is no clear, well-established division of responsibility between the bottom up policy making organs (the Supporting Organizations and Advisory Committees) and the Board. The Board is all-powerful and too far removed from what should be its membership. The bottom up process is little more than a chaotic, slow and reversible attempt to compete for the attention of the Board. Most participants perceive it as just one of many options for influencing the Board. Interest groups who do not get what they want from the bottom up process always try to reverse or alter the results by going directly to the Board. The Board contributes to this problem by repeatedly altering processes and outcomes with special arrangements. One example is the 2009 "Implementation Review Team" that gave one noisy stakeholder group the right to conduct their own policy making process after the official one was finished.

With so many issues and people bearing down on them, the Board relies increasingly on its professional staff to manage its information flow – which gives the policy staff enormous discretionary, unaccountable power over the outcome of policy and process disputes. One of the problems here is the oft-asserted distinction between policy *making*

(which is supposed to be done by representative organs on a bottom-up, consensus basis) and policy *implementation* (which is delegated to ICANN's professional staff). Too often, the concept of "policy implementation" becomes a process of "policy making" by staff and management. Staff policy making can be influenced by behind-the-scenes lobbying or even the policy staff's own views. This growing staff influence comes at the expense of the public stakeholders who are supposed to be shaping ICANN's processes.

With its growing staff and financial resources, the Board or its President can set the policy agenda from the top down, or manipulate and short-circuit the underlying "bottom-up" processes. Its financial resources can be used to lobby for its own interests on a global scale. The bottom up organs, the Supporting Organizations (SOs) and Advisory Committees, have increasingly overlapping areas of interest, yet have uncoordinated processes. As they compete for the attention of the Board with their own proposals and positions, the Board and staff attains absolute discretion as to which one it wishes to pay attention to. It can play them off against each other, eliminating accountability and making it impossible for any SO process to have a predictable result, even if it achieves some measure of consensus on its own terms. Additionally, organized industrial interests in the U.S. can always bypass those processes and go to the U.S. government, through the JPA renewal process, or to Congress to pressure ICANN.

Further, we note that while ICANN has not implemented any new accountability measures, its exploratory efforts to establish a legal presence outside the US confuses, and may worsen, its accountability deficit. The idea of an ICANN with multiple legal commitments to different jurisdictions undercuts the original idea of a global governance and coordination agency which served as the rationale for a private sector nonprofit in the first place.

Note that these criticisms of ICANN, while severe, are *not* arguments for retaining or extending the JPA. The JPA review and renewal process actually exacerbates the problems described above, by adding yet another layer of discretionary authority and another opportunity for venue-shopping. We note that public comments in this proceeding routinely confuse the expiration of the JPA with the complete independence of ICANN; they also, as noted above, tend to address policy preferences rather than structural issues and institutional design.

What accounts for these persistent problems with bottom up and accountability? In our view the answer is surprisingly straightforward. ICANN was incorporated under a specific legal framework (California Nonprofit Public Benefit Corporation law) with fairly good accountability features. The basic accountability framework of that law rests on the notion of a "Statutory Member." The California law's accountability measures and protections against abuses only apply to statutory members. Once ICANN detached nearly all of its participants from statutory member status after 1999, it basically cut itself off from the basic protections of the laws it was incorporated under. ICANN now claims to be accountable to anyone and everyone – and thus in reality, it is accountable to no one. If one believes that the membership provisions of California corporate law don't

scale to a global level, then either the membership issue must be cleared up, or another legal framework found.

## **Revising the Model**

Question 2 of the NOI asks whether transition to the private sector is still the most appropriate model. We think this question goes to the core of the problems with ICANN. The model was once appropriate, but it has been implemented so poorly that it is hardly recognizable. ICANN's detachment from the membership provisions of California Nonprofit Public Benefit Corporation especially undermines the original model. What has been missing is a legal framework with clear lines of accountability to real stakeholder/members.

IGP has from the beginning been a strong supporter of a global, nongovernmental model for the governance of critical Internet resources. The strategy of achieving global governance and coordination through private contractual approaches could still work, provided that the proper legal and institutional framework is in place. When governments privatized Post, Telegraph and Telephone monopolies, they invariably created legal and regulatory frameworks within which the privatized entity(ies) functioned. Likewise, nonprofit private sector entities were never meant to be detached completely from any membership and given free rein to define, on their own, complex structures of representation and participation.

ICANN's status as a public, global governance agency needs to be accepted and recognized. There should be lawful constraints on its mission and adequate checks on the potential for abuse of its authority. These should come from a formal international agreement initiated by the United States. This instrument should be seen not only as a way of checking or limiting abuses by ICANN itself, but also as a way of limiting interference in ICANN by governments (both foreign and the U.S.). Governments should be involved not as "oversight" authorities or "public policy makers" but as backers of a shared legal framework that maintains accountability and gives non-state actors a legal basis for settling important disputes.

An international agreement along these lines should have the following elements:

- The nongovernmental status of ICANN should be affirmed and formalized, as a protection against takeover by governments
- The sovereignty of national governments over ccTLDs should be formally recognized, and authority over their delegation ceded from ICANN to national governments using a formal, secure and verifiable process. The e-IANA concept, which allows recognized ccTLD managers to update their root zone entries directly, should be implemented.
- There should be a prohibition on using ICANN for content regulation; the instrument should also create a right of private parties to initiate legal challenges to ICANN actions on these grounds.
- The agreement should ensure the consistency of economic regulation of DNS and IP addressing with antitrust and nondiscriminatory trade principles (consistent with its current mandate to increase competition); here again, there

should be a right of private parties to initiate legal challenges on these grounds.

- Selection of an appropriate body of national law under which ICANN should operate. If California Nonprofit Public Benefit is deemed the best option, then its membership provisions need to be rethought and re-applied to ICANN in a way that does not permit it to evade accountability and substitute open-ended “participation” for binding rights and obligations vis-à-vis its members.
- GAC should be dissolved and the Supporting Organizations opened to participation by individuals from governments.
- As a final step, providing a legal foundation for ICANN as described above would allow for the dissolution of the existing IANA contract when appropriate. But until the process was completed the U.S. would, *de facto*, be able to retain that authority.

We believe that formal action by the U.S. in agreement with other cooperative states is the only way to finalize the transition. Without such a legal framework, ICANN’s accountability and process problems will not be solved, and may worsen. Without a transition away from the JPA, on the other hand, ICANN’s legitimacy will continue to suffer, domestic U.S. interests will continue to exploit U.S. oversight to achieve short-term policy advantages, and the threat of an Internet fragmented by the adverse reactions of other states will continue to loom.

The Internet Governance Project (IGP) is an alliance of academics that puts expertise into practical action in the fields of global governance, Internet policy, and information and communication technology. For more information please visit <http://internetgovernance.org> or contact us at [info@internetgovernance.org](mailto:info@internetgovernance.org) with questions or comments.