What to Do About ICANN: A Proposal for Structural Reform

Concept Paper by the **Internet Governance Project**

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Executive Summary

With the 2005 World Summit on the Information Society (WSIS) in Tunisia quickly approaching, and with the work of the UN Working Group on Internet Governance (WGIG) well underway, it is time to identify concrete policy options for Internet governance. Any initiatives in this area must address the criticisms that have been made of ICANN. Although the international community has defined "Internet governance" in a way that goes beyond ICANN's control of domain names and addresses, ICANN nonetheless remains central to many issues. Here we propose a series of structural reforms for it.

The proposals here are designed to address the most important criticisms that have been made of ICANN. These criticisms include:

- Concerns about unilateralism by the US Government in its control of the DNS root and its supervision of ICANN.
- Dissatisfaction with ICANN's Government Advisory Committee (GAC), where governments have only advisory powers.
- The perception that ICANN's governance model does not properly balance the interests of developed and developing countries and suppliers and users.
- Concerns about the relations between ICANN, country code top level domain administrators (ccTLDs), and national governments.
- The overall perception that ICANN lacks legitimacy.

To address these issues, this paper proposes the following reforms for ICANN:

1) **Limits on power and internationalized oversight.** A legally-binding international agreement narrowly defining ICANN's powers and replacing US Government supervision with internationalized supervision[2]. This would allow abolition of ICANN's Government Advisory Committee.
2) **Democratization**. Reinstatement and strengthening of the At Large membership of ICANN, especially a return to election of the At Large Board members and the granting of voting rights on ICANN's GNSO to At Large representatives.
3) **Competition**. Coordinated sharing of responsibilities between ICANN and the ITU in a way that would allow ccTLD managers and IP address users a choice of alternative governance arrangements.

[1] The **Internet Governance Project** is a consortium of academics at Syracuse University, Georgia Institute of Technology, and the Universität Zürich. Authors of this paper were Hans Klein and Milton Mueller.
[2] The IGP has advocated a similar approach to broader issues of Internet governance. See: "A Framework Convention: An Institutional Option for Internet Governance" at www.InternetGovernance.org

ICANN Today

Today ICANN exercises quasi-governmental powers. However, it lacks corresponding mechanisms for accountability, oversight, and representation.

ICANN makes global public policy in a number of fields. It makes competition policy by controlling business entry into the domain name registry market and by determining the market structure of that $2 billion industry. It engages in rate regulation, setting the base price for the majority of the world's wholesalers and retailers of generic domain names. It makes intellectual property policy by defining and enforcing global "laws" regarding rights in domain names. Indirectly, ICANN affects freedom of expression, because its rules on trademark protection in domains set limits to public use of words, and its rules regarding registrant data are intended to make anonymous expression on the Internet impossible. Many would say that ICANN also engages in taxation: it imposes per-domain fees on domain name registries, and the fees have grown sharply over time. Finally, ICANN's powers are open-ended: the entities it regulates must commit to implementing any further policies that the organization should promulgate. ICANN's regulatory and supervisory activities constitute global public policy of a type usually exercised only by governmental (or inter-governmental) entities.

Today, supervision over ICANN is performed by just one government: the United States. The US Government has a contract with ICANN to perform the central coordinating functions of the domain name system and Internet Protocol addresses. It also has a Memorandum of Understanding (MoU) to perform certain policy functions for domain names. In the words of the MoU, "ICANN serves as the forum for designing, developing, and testing the mechanisms for the performance of these Internet coordination functions – both the development of the relevant policies and the execution of those policies." The US Government also retains policy authority over the DNS root, which is the control point for enforcing ICANN's regulations.

The special status of the US vis-a-vis ICANN creates an imbalance of authority. The DNS root is a global resource, and the Internet is a critical infrastructure for all countries of the world. As early as 1998, when the US Department of Commerce issued a *Green Paper* on Internet administration, other countries have asserted their right to participate in Internet governance. Yet today only one government supervises ICANN.

Within ICANN (and therefore subordinate to US authority) there exist additional accountability mechanisms, but these are also flawed. As the basis of its accountability, ICANN locates policy development in functional constituencies. Three supporting organizations (SOs) select directors to serve on the board, which is ICANN's top policy-making body. ICANN's staff provides one additional board member (the president). Two advisory committees provide additional non-binding input, from governments and individual users. However, the SO system is biased in favor of business interests, while the advisory committee structure commits governments and users to ICANN's decisions without giving them formal power. ICANN's staff has significant time and information advantages over other participants, allowing them to short-circuit the so-called bottom-up

process. The US Government is in a much stronger position to influence policy than any other player.

ICANN's mechanisms have also favored early entrants to its processes. Like all self-regulatory agencies, ICANN's processes reach an impasse when there are fundamental disagreements among stakeholders. As a result, it has been almost impossible to change policies that were put into place at ICANN's inception, before any real representational structures existed.[3] This has favored ICANN's staff and the US Commerce Department, who exercised great influence early in ICANN's history.

ICANN's original design did not contain all these flaws. First, the original ICANN was to be a non-governmental organization. The US government committed to "privatizing" the Internet, by which it meant that policy authority would be ceded to ICANN as an independent corporation subject to direct public participation via membership and voting. As a non-governmental entity, ICANN would have avoided issues about the balance of power among overseeing states. Second, the original ICANN had more balanced internal representation. Industry representatives were to be balanced by user representatives elected through global direct elections. ICANN's policies were to be anchored directly in the consent of the governed. These core features were eliminated before being fully implemented. ICANN's reforms of 2002 eliminated At Large membership, dropped user representation from the board of directors, while the US government's continued oversight left global governance under one nation's power.

Today ICANN's status is not secure. ICANN has diverged from its original design, it lacks accountability mechanisms, and other governments are criticizing its special relationship with the US. A US spokesman has recently suggested the US would consider releasing ICANN from US oversight when the MoU and the IANA contract expire in 2006. ICANN's own draft strategic plan of 2005 includes language about independence.

Solutions

There appears to be a consensus that reform is needed. However, few specific policy options have been advanced. The proposals here would both limit ICANN's powers and create stronger accountability mechanisms.

We consider three types of accountability. *Top-down* accountability would subject ICANN to a higher, established authority (agreements among national governments). *Bottom-up* accountability would make ICANN directly accountable to users and other stakeholders. *Peer-to-peer* accountability would locate ICANN in a competitive/cooperative position with another international organization, providing users with a choice among coordinated governance arrangements. We consider each in turn.

[3] For example, ICANN repeatedly has proven to be unable to alter simple flaws in the UDRP, and has languished for three years over the conflict between privacy rights and the registrant data publication requirements of ICANN's registrar accreditation agreement.

A. Top-down Accountability: Limits on Power and Internationalized Oversight

Perhaps the simplest step towards achieving accountability would be to impose clear limits on ICANN's powers and to enforce those limits with governmental oversight. Today such a system is in place, but it is limited to one government. The Memorandum of Understanding (MoU) specifies ICANN's powers and responsibilities, and the regular expiration of that MoU creates an opportunity for the US Government to review and possibly terminate ICANN's position. A similar mechanism could be used to bring ICANN under international authority.

An explicit, internationally agreed statement of the scope of ICANN's powers would limit its mission. Limits could take the form of a positive list of ICANN's authorized activities: so much would be allowed, but no more. The allowed functions might include: assignment of top-level IP address blocks, top level domain names, and port numbers; coordination of root server operations; development of simple, objective, transparent methods for addition of new top-level domain names; defined procedures for executing dispute resolution procedures over second-level and top-level domain names. Broader functions of Internet governance would be significantly absent from the list. These limits could be codified in a contract, a Memorandum of Understanding, a multilateral framework agreement, or some other legally-binding international agreement.

These limits would be enforced by a higher oversight body comprised of national governments. The United States Government's supervision authority would be replaced with an internationalized supervisory and dispute resolution process that is minimal and light-handed. ICANN would continue to administer Internet resources, but governments would have authority to make sure that it does not abuse a carefully defined and delimited mission.

Such a system of top-down accountability would render ICANN's Governmental Advisory Committee (GAC) unnecessary. In the GAC governments serve as junior partners in ICANN's policy making apparatus. In this proposal, they would be less immediately involved in the policy process but more fully empowered as overseers. Governments cannot properly supervise ICANN and guarantee accountability if they are also part of ICANN. If they are built into its structure they become stakeholders and influential factors within ICANN, and therefore are in no position to objectively judge whether it has strayed from its mission or abused its powers. As an example, one cannot expect a government to apply competition law evenhandedly to a monopoly enterprise created by the government or a state-owned enterprise in which the government has a substantial economic stake. If governments want to supervise ICANN they have to get out of its day to day workings.

B. Bottom-up Accountability: Democratization

A second way to increase accountability would be to empower stakeholder groups. Such bottom-up accountability relies on groups in industry and civil society as well as on individuals. As noted earlier, ICANN's original design located accountability in such bottom-up mechanisms. The board of directors was to be elected by two classes of stakeholders, individual users and industry stakeholders (also conceived as consumers and suppliers), and these entities were to both formulate policy and hold it accountable through elections. This was a bottom-up, self-regulating approach, in which ICANN governed by the consent of the governed.

Bottom-up accountability builds legitimacy by anchoring ICANN in societal entities rather than in political institutions. Such legitimacy is *global* instead of *international*, i.e. it presupposes a global society in the Internet sector to which ICANN is held accountable. Such a societal-based, bottom-up approach offers some advantages. First, not being constrained by political boundaries, it avoids the jurisdictional fragmentation of states. Second, and related, it makes it possible to institutionalize a global public interest. Whereas national governments at the global level each pursue their particular national interest, societal-based accountability more closely resembles domestic political accountability, where regulatory institutions are accountable to society as a whole.

The most ambitious mechanism for bottom-up legitimacy is global direct elections. ICANN successfully held such elections in year 2000. These elections were reviewed and endorsed by an ICANN-appointed expert panel that included representatives of the US-based Carter Center, which monitors elections world wide.[4] However, in a move characterized as a "palace coup" by the Carter Center representative, ICANN's elections were unexpectedly eliminated in 2002 before balanced representation was implemented. This created a major legitimacy deficit in ICANN; reinstatement of those elections would correct this problem.

Another way to improve bottom-up legitimacy in ICANN is through multi-stakeholderism. In this approach, civil society groups are allowed to participate in policy making and/or oversight bodies. ICANN's various supporting organizations employ this approach to stakeholder input.

Multistakeholderism is not without problems. If stakeholders are left to self-organize, some interests may go unrepresented and others may be over-represented. Furthermore, representation structures may give unequal weight to different classes of stakeholders. For example, ICANN's Generic Names Supporting Organization (GNSO) has six different constituencies devoted to business interests, only one devoted to non-commercial users, and none at all devoted to individual domain name registrants. Still, such weaknesses can be corrected. At Large representatives could be empowered to vote on the GNSO Council, and the business users and intellectual property constituencies could be merged, since trademark owners are simply a subset of business users.

[4] See the "Final Report on At Large Membership" by the ICANN At Large Study Committee, www.atlargestudy.org/final_report.shtml., November 5, 2001.

C. Peer-to-Peer Accountability: Coordinated Competition

The two accountability mechanisms discussed so far subject ICANN to oversight by external and qualitatively different groups – oversight by states from above and oversight by societal groups from below. Another important reform would be to subject ICANN to peer-based oversight.

What we call peer-to-peer oversight is familiar from other institutions. Markets employ peer-to-peer oversight by placing firms in competitive relationships. Firms discipline each other by competing to offer their users better products or services. Likewise, most Western constitutional systems divide power into separate branches -- the legislature, the judiciary, and sometimes a separate executive branch. These exist in both a competitive and a cooperative relationship, with the different branches watchfully overseeing the actions of the others.

Peer-to-peer oversight could be achieved in ICANN by sharing control over the Internet name and address spaces. ICANN's monopoly over the name space would be terminated, and instead it would share its authority with a peer entity -- most likely the UN's International Telecommunications Union (ITU).

In such an approach the ITU could assume management responsibility for part of the IPv6 address space. ICANN has already created new Regional Internet Address Registries such as LACNIC for the Latin American region and AfriNIC for the African region. There is no reason why, in the IPv6 address space, the ITU could not also be made into an address registry. In the new, IPv6 protocol, there are plenty of unoccupied address blocks to assign to the ITU, allowing it to establish its own policies and practices. Since the ITU operates on the basis of a completely different, inter-governmental governance model, states and Internet service providers who preferred that governance model could acquire their addresses from the ITU. Others could stick with the existing address registries, which are more closely tied to ICANN. The ITU could then delegate IPv6 address space on the basis of national jurisdictions, in line with its traditional sovereignty-based model. By accepting this role, the ITU would also be accepting the continued existence of ICANN.

Likewise, responsibility for coordinating the top level of the DNS name space could be shared. It is technically feasible to coordinate an ICANN-administered part of the root zone file with an ITU-administered part of the root zone file, as long as it was perfectly clear which one had authority over which TLD. We propose that ICANN retain responsibility for root zone administration for generic TLDs (e.g., .com, .net, .org, .info, and so on) and give the country code TLDs a choice of which international organization to use. Thus, ccTLD administrators who were willing to sign contracts with ICANN would remain with the ICANN regime; nations that preferred to work with the ITU could register their ccTLDs with the ITU-administered part of the root zone file. When changes in the root zone file were made, simple procedures for concatenating the ICANN and ITU-administered parts of the file and propagating them through the root servers could be defined. New generic TLD creation would likely have to remain in the ICANN process,

as it is potentially destabilizing to give autonomous entities the power to add to the root zone.

While a shared root zone may seem radical, the fact of the matter is that the vast majority of ccTLDs currently refuse to join the ICANN system. Nonetheless, they coordinate with ICANN.

Conclusion

ICANN was an important institutional innovation. Its contractual method of governance was a response to the uniquely global nature of Internet communication. ICANN's monopoly on authority over the DNS and IP address roots, however, gives it powers normally reserved to government. In order to render its contractual mode of governance legitimate, ICANN's powers must be accompanied by appropriate accountability mechanisms. The mechanisms presented here provide some concrete options for achieving that. We have proposed three kinds of accountability mechanisms: "top-down", which subject ICANN to a higher, established authority (agreements among national governments); "bottom-up", which would make ICANN directly accountable to a global public; and "peer-to-peer", which locates ICANN in a coordinated but competitive position with the ITU, providing users with a choice among alternative governance arrangements.

Each mechanism has its particular advantages. Top-down accountability is a proven mechanism, already imperfectly implemented in ICANN's MoU with the US Government. Bottom-up accountability links ICANN to a global public interest, realizing legitimacy comparable to that of domestic policy making. Finally, peer-to-peer accountability gives both ITU and ICANN strong incentives to adapt to the most important needs of users.

The reforms proposed here could be implemented as a set or individually. Any proposal would work on its own, and any one would improve ICANN. However, in their entirety they would address the concerns of major stakeholders. National governments would benefit from shifting from an advisory role to an oversight role. Internet users and diverse stakeholders would benefit from direct and equitable participation in policy-making bodies. Developing countries would benefit from leveraging their established expertise in ITU processes. All Internet users would benefit from market discipline of coordinated competition between regulatory entities.

Internet governance is more than ICANN, but ICANN is the most important element in today's governance arrangements. The proposals here constitute concrete steps toward improving ICANN and making Internet governance accountable, representative, and efficient.

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Resources for more information

The Internet Governance Project. Basic gateway to analysis of Internet governance
http://www.internetgovernance.org

ICANNWatch. Ongoing critical commentary on news and events related to ICANN.
http://www.icannwatch.org

Hans Klein, "The Feasibility of Global Democracy: Understanding ICANN's At Large Election." Special issue of the Journal **Info** on ICANN and its global elections
http://www.prism.gatech.edu/~hk28/klein-democracy.pdf

Milton Mueller, **Ruling the Root: Internet Governance and the Taming of Cyberspace**. MIT Press, 2002. A comprehensive, book-length account of the history and evolution of Internet DNS governance up to and including the creation of ICANN.

Noncommercial Users Constituency. The home of civil society representation in ICANN policy making and Board elections.
http://www.ncdnhc.org

The Internet Governance Caucus. The Civil Society caucus of the UN World Summit on the Information Society devoted to Internet governance topics.
http://www.net-gov.org

Electronic Privacy Resource Center (EPIC) Whois page. How ICANN intersects with privacy policy.
http://www.epic.org/privacy/whois/

The UN Working Group on Internet Governance. Web site of the official UN Secretary-General's Working Group
http://www.wgig.org