

Comments of the Internet Governance Project
on
The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement
submitted to
The National Telecommunications and Information Administration
U.S. Department of Commerce
February 15, 2008

The Internet Governance Project (IGP) welcomes the opportunity to comment on the midterm review of ICANN's Joint Project Agreement with the U.S. Department of Commerce. IGP is an expert advocacy group, an international alliance of academics with scholarly and practical expertise in international governance, Internet policy, and information and communication technology.

IGP's research and advocacy upholds the values of a global, borderless Internet, individual human rights and democratic governance. Consonant with these values, IGP supports the transition of Domain Name System coordination to a nongovernmental, multi-stakeholder institution. It favors limiting ICANN's powers to a neutral coordination mission, and favors new global governance arrangements to more permanently clarify and limit the influence of national governments, including the U.S. government, over DNS policy.

The Department of Commerce's National Telecommunications and Information Administration has requested comments on how much progress has been achieved on the specific responsibilities identified in its Joint Project Agreement (JPA) with ICANN. It is IGP's view that it is time to move beyond the JPA. The JPA, like the Memoranda of Understanding which preceded it, was designed to be a checklist of policy-oriented tasks that must be performed to the US Government's satisfaction. The JPA has served its purpose in nudging ICANN forward towards more mature governance practices. At this time, it is no longer appropriate for the U.S. government to set policy priorities for a global governance institution such as ICANN. The JPA process establishes a potentially endless process of review in which US-centered special interests lobby the Commerce

Department or Congress to interfere in DNS management in ways that they favor.[1] Therefore we look forward to termination of the JPA in September 2009.

We do not, however, fully agree with ICANN's implied claim that it does not need any external oversight. We look forward to replacing the JPA with new forms of oversight rooted in the global Internet community.

IGP, like many other stakeholders, does not believe that ICANN is ready to be fully independent yet. And like any other institution it can benefit from independent authorities able to review aspects of its operations. ICANN has made major improvements in its transparency, most notably through the release of more detailed, timely minutes of Board meetings and through some improvements in the accessibility of information on its website. It has also made a good faith effort to implement some of the advice of the OneWorld Trust report. It has taken important steps to implement recommendations made by the London School of Economics report on the representative structure of the Generic Names Supporting Organization. There are some of the most important examples of ICANN's good faith efforts to improve its processes and transparency.

The simple fact is that ICANN's remaining problems are not related to any specific task on the JPA checklist. The problem is more fundamental and systemic. It can be summed up in two words: *external accountability*.

External accountability refers to the ability of members of the Internet-using public to effectively sanction the organization and/or to replace Board members or officers when they consistently make bad policy decisions or are derelict in their duties. In national governmental institutions, external accountability is provided by two means: voting (which allows officials who do not execute the public will to be thrown out of office); and independent judicial review (which allows illegal decisions to be punished or reversed). ICANN has quasi-governmental powers over Internet identifiers, yet lacks both of these mechanisms of external accountability.

The only reason to retain the JPA is to retain some kind of incentive for ICANN's management to rapidly institute effective remedies for its accountability problems in the remaining 18 months. Since it is apparent that ICANN's management and Board want the JPA to be lifted, we urge the NTIA and the involved community to make *strengthened external accountability* the sole, focused criterion for ending the JPA by September 2009. IGP believes that the JPA *can* and *should* be ended by September 2009 if the accountability issue is resolved. Below, we diagnose the accountability issue and propose five reforms that could be taken by September 2009 to resolve it. The section after that addresses the longer term transition and specifically the role of governments in ICANN's oversight.

[1] As ICANN's Chairman of the Board wrote in his response to this notice, "To ask 'Could more be done by ICANN in this area' is a question that will always lead respondents to say: 'Yes. ICANN can do more'." Comments of PDT, 9 January, 2008.

Diagnosis of Accountability Problems

ICANN's accountability deficit results from a combination of structural and historical factors. With its exclusive control over the Internet's name and address roots, ICANN has taxing and policy authority over the domain name industry. Domain name registrants, registrars and registries cannot avoid paying these fees nor can they escape its policies. Unlike private companies operating in a market place, there are no competitive alternatives to which these stakeholders can turn if ICANN becomes dysfunctional or abusive.

And yet, ICANN Board members are not elected by the public; most are anointed by a Nominating Committee whose composition, while containing representatives of the stakeholder community, is also influenced by the existing Board and staff. This committee makes its selections in secret based on unknown criteria. If there were ever an inattentive, misguided or malevolent Board, it could not be thrown out of office or effectively challenged by affected stakeholders. Board members can only be gradually and incrementally replaced through the diffuse, opaque and indirect process of the Nominating Committee, or by replacing Supporting Organization selections one person at a time. There is no coordinated way to rebuke or replace a major part of the Board. The Independent Review Panel (IRP) merely checks against specific actions inconsistent with ICANN's own articles and bylaws. It does not provide a political check against a Board that consistently disregards the policy preferences of the public. Moreover, the IRP, as the OneWorld Trust noted in its report, is not a stable, institutionalized external check on ICANN's actions.[2] Even a successful IRP challenge would leave in place a decision making system with the same propensities. It also does not prevent the Board from altering the bylaws in ways that would retroactively legalize actions that are bad for the public interest.

Just as the accountability of the Board to its public is weak, so is the accountability of the CEO to its volunteer Board. The ICANN management operates too independently of Board oversight and, in combination with a large, well-funded and growing staff, may have too much influence over the Board's agenda, information and decisions. The Board does not have its own staff, and thus is dependent on management staff. Finally, the complexity of ICANN's policy making structures, which divide up authority among different supporting organizations and advisory committees with overlapping areas of interest, makes it too easy for policy making processes to be gamed or "forum-shopped" by an executive branch with its own agenda, and for critical policy initiatives to fall through the cracks.

---

[2] See "Independent Review of ICANN's Accountability and Transparency – Structures and Practices." A report commissioned by ICANN from One World Trust, March 2007. http://www.icann.org/transparency/owt-report-final-2007.pdf The report also (correctly) dismisses ICANN's reconsideration committee: "When Board members who participated in the original decision are the only people reconsidering that decision possible issues arise related to the objectivity of the process." (p. 50)."

In sum, there are serious, structural accountability issues in ICANN that must be addressed before completing the transition. Given this diagnosis, an immediate end to the JPA might send the wrong signal. It might convey to the current management and Board, or to the public, that ICANN's accountability mechanisms are sufficient.

Appropriate Reforms

We propose the following reforms to address these accountability issues. They are reasonably straightforward changes that could be made by September 2009.

1. ICANN Supporting Organizations and the At Large Advisory Committee should be empowered to hold a "vote of no confidence" in the Board or the CEO. A vote of no confidence in the Board would result in the recall of all three of that Supporting Organization's (or, in the case of ALAC, all five Nominating Committee) Board members and their replacement through a new election. A vote of no confidence in the CEO by at least two of the three SOs (or one SO and ALAC) would require the Board to dismiss the existing CEO and hire another. No confidence votes would require a supermajority, perhaps of 70%.[3]
2. Complete the process of instituting the reforms in GNSO representational structure proposed by the ICANN Board Governance Committee
3. Change the Independent Review Procedure to follow the recommendations of the One World Trust report
4. Allocate a certain portion of ICANN's budget to the support of a staff/secretariat that reports directly to the Board chairman and is independent of the CEO.
5. Last but not least, ICANN and the UN Internet Governance Forum should agree to conduct a bi-annual review and public consultation concerning ICANN's record and accountability.

These reforms do not address all of the structural problems we identified above. If they are put into place, however, they will provide a bulwark against major abuses, and lay the foundation for the progressive improvement of ICANN within the framework of a non-governmental, multi-stakeholder model.

[3] This proposal has some similarities but also important differences with the ideas put forward by ICANN in its document "Next steps in continuous improvement of ICANN dispute resolution and Board processes," 11 January 2008. http://icann.org/transparency/next-steps-dispute-resolution-11jan08.pdf. Most notably, in order to protect against intergovernmental dominance of ICANN we do not believe that the GAC should be given the power to dissolve the Board simply by issuing a consensus statement of the government representatives who happen to attend a meeting. This introduces a dangerous imbalance into ICANN..Our proposal is also less destabilizing than the ICANN idea, because it recalls only parts of the Board and does not dissolve the Board as a whole.

The role of the IGF

Our comments have focused on ensuring accountability for ICANN's tasks of coordinating the name and address spaces. To a large extent this can be achieved by the internal procedural and structural changes that we have recommended. The issue of accountability, however, has to be placed in a broader context.

ICANN administers critical Internet resources and, in that sense, is connected with larger Internet governance issues. These issues primarily involve the need to establish clear rules for resolving conflicts in a globally coordinated way when different jurisdictions, policies, programs, and institutions with authority over different parts of the Internet clash with each other. As a coordination and policy making body that was intended to transcend national jurisdictions, ICANN is particularly at risk for raising such policy conflicts, as some of its more controversial actions (such as designating top-level domain names or the operation of the Whois directory) have shown.

Given that ICANN has government-like control over an essential part of the Internet, some form of oversight is necessary. But, because of the Internet's global scope and non-territorial nature, no individual government (or even collection of governments) could realistically ensure effective oversight.

We suggest, therefore, that a new external oversight arrangement for ICANN be set up by leveraging the innovation and experimentation of the Internet Governance Forum. The IGF is an appropriately neutral, nongovernmental platform for discussion, consideration of evidence and the development of non-binding reports and recommendations. The IGF was given an open-ended mandate to explore emerging issues of Internet governance in a different way than traditional intergovernmental bodies. Under this arrangement, ICANN has already undertaken to participate in and report to the Forum, as it did in the 1st and 2nd Internet Governance Forum meetings in 2006 and 2007 respectively. The issue of critical Internet resources is now an established part of the IGF's Agenda. Biennial review by the non-binding, multi-stakeholder IGF would serve as a kind of "soft oversight," an experimental approach appropriate to the Internet.[4] Oversight by the IGF would have far more international legitimacy than any of the available alternatives. We believe that "soft oversight" by the IGF would be preferable to the politicized and unilateral form of JPA oversight exercised by the US Commerce Department, and superior to any form of top-down, intergovernmental oversight.

IGF reviews of ICANN would help to alert the global community when its policies, decisions, programs and processes conflict with other aspects of Internet governance. Whether this is the case can emerge if ICANN reports are discussed and problems identified by the different stakeholders involved (governments, the private sector, civil

[4] We note that the OneWorld report also recommended a periodic review of ICANN's accountability: "Recommendation 5.1: ICANN should consider having an independent report produced, perhaps annually, that would measure the organisation's compliance with transparency and accountability commitments made in its By-Laws." (p. 35)

society organizations, technical bodies and even individuals). This is the kind of "soft power" that in most international regimes provides a reasonable basis for ensuring order.

Until such time as a formal international regime is negotiated, ICANN should report to the Forum and take into account the comments received. All that is required is that ICANN be mandated to report and formally address comments and recommendations that may emerge from the IGF.

This procedure should be one condition for ending the JPA in 2009. Specific modalities for ICANN oversight in the IGF context should be worked out in the context of the 2008 IGF meeting in Delhi, including work by an ad hoc technical panel, operating transparently and consisting of a balanced representation of all stakeholders, including ICANN itself, that could meet in advance and provide recommendations on processes to follow. This would put the international community on a clear path to solve whatever governance and oversight problems may be lingering with ICANN.

Completing the Transition

Several comments in this proceeding suggest that the JPA should be retained as a way of "protecting the DNS against interference by governments." IGP believes that these proposals are poorly thought out. It should be obvious that the future of the JPA has nothing to do with ICANN's potential or speculative subordination to other governments. It is about ICANN's subordination to the US government.

The relationship between ICANN and the world's national governments is important, as other comments have suggested. We do need to come to grips with whether we are going to "complete the transition" of ICANN to wholly nongovernmental status. But to use this as an argument for retaining the JPA is illogical and completely distorts the dialogue around ICANN's near-term transition.

If we assess the actual risks of arbitrary governmental interference in DNS, it is evident that modifying the ICANN-JPA relationship provides very little leverage against those risks. At best, terminating the JPA reduces one of the most direct sources of potential interference: from the US government itself.

The IANA contract is the real source of ICANN's authority over the DNS, and the key to U.S. authority over ICANN. Whatever happens to the JPA, the US still retains the IANA contract, a critical form of power over ICANN. Ending the JPA only removes the U.S. from the business of specifying particular policies and practices, which is a good thing. U.S. authority over the IANA function will remain controversial and troublesome to the rest of the world regardless of what happens to the JPA. Trying to use the JPA to expand or extend U.S. authority over the Internet would only make the situation worse.

Those who are concerned about arbitrary governmental or political interference in DNS need to turn their eyes away from the JPA and look at more tangible and immediate threats. ICANN's Governmental Advisory Committee (GAC) is open to membership

from all of the world's national governments and intergovernmental organizations. Despite its nominal status as an "Advisory Committee" within a private corporation, GAC is really an intergovernmental body with the potential to reproduce the alliances, coalitions and politics of the UN. Since 2002, it has been practically mandatory for ICANN to follow GAC's "policy advice."[5] But unlike a "real" international organization, GAC's authority is not based on a formal treaty, and its rules and powers were never ratified by any democratically elected legislature. Moreover, unlike a formal treaty or negotiation process, which requires consensus agreement among all governments before it is effective across all jurisdictions, GAC is able to issue "policy advice" without obtaining a formal consensus of its members. Thus, as a vehicle for arbitrary governmental interference in DNS, GAC raises far more concerns than the UN, the IGF, or unilateral actions by other governments.

IGP believes that governments have an important role to play in developing globally applicable policy principles for the Internet, but is on record as stating that the GAC is the wrong model for accomplishing this end.[6]

IGP suggests that any concern about the long-term status of ICANN's independence from national governments must put GAC and its peculiar status at the center of any discussion. But those issues are not appropriately considered in a U.S. Commerce Department review of its JPA with ICANN. Consistent with the proposals advanced earlier in these comments, we believe that longer-term transition issues are best handled within the framework of ICANN and the UN Internet Governance Forum – not in a proceeding devoted to the future of a U.S. Commerce Department agreement.

[5] See Article XI, Section 2 (1)(j) of the ICANN by-laws, which stipulate that if the Board does not follow GAC "advice" it must jump through some procedural hoops and negotiate with GAC to reach a mutual agreement. No other supporting organization or advisory committee in ICANN has the same authority.
[6] See the transcript of comments of Dr. Milton Mueller at the "critical internet resources" panel of the Rio Internet Governance Forum, 12 November 2007, http://www.intgovforum.org/Rio_Meeting/IGF2-Critical%20Internet%20Resources-12NOV07.txt