

## **An Independent ICANN? After (or if) the United States Government Lets Go**

*Comments of Dr. Milton Mueller, Syracuse University School of Information Studies at the WSIS Prepcom 2 panel on Internet Governance, February 17, 2005*

The US Government has a special role with respect to oversight of ICANN. A United States Government process created ICANN and the United States Government retains policy authority over the domain name system's root. The United States has a contract with ICANN to perform the so-called IANA functions.<sup>1</sup> It also has a Memorandum of Understanding 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" Both the MoU and the IANA contract are set to expire in 2006.

The US government's special role as founder and supervisor of ICANN is controversial. "Unilateralism" was targeted by Brazil, South Africa and other countries for criticism. In response to this criticism, the US government has announced its intention to release ICANN from its contractual and policy supervision in the year 2006.

ICANN's impending release from US control is a critical test of the non-state governance model. Do we really want ICANN to be independent? If not, how should it be held accountable? This is a special problem for civil society actors in WSIS, because ICANN, unlike intergovernmental organizations, permits civil society to participate in its processes openly. The ICANN governance model is based on the ideal (if not always the reality) of "bottom up" policy formulation and multistakeholderism.

When considering the accountability and supervision of ICANN, it is important to remember that ICANN's powers over the domain name system are truly governmental in nature. It regulates prices and controls the structure of the \$2 billion domain name registration industry. It controls entry into the domain name registry business. The source of this power is its control of the DNS root zone file. This gives it control of TLD addition, which gives it control of TLD registries' contracts, which in turn gives it control over registrars, which in turn gives it some powers over end users in their capacity as domain name registrants. Network externalities make it extremely difficult to compete with or offer a substitute for ICANN's name space administration. Replacement is not impossible but would require a major technological or market disruption.

Should this power be in the hands of a private, nonprofit corporation? If one considers the word "private" to be an inherently bad word to you, then the answer is easy: No. But

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<sup>1</sup> IANA means "Internet Assigned Numbers Authority" and is a central coordinating function that provides unique address blocks, top-level domain names, and protocol parameter numbers.

consider the alternative. The alternative is not really “public” control but “governmental” control. Any governmental solution would have to be an international one. At the international level, governments may be further removed from accountability than ICANN’s management is. Governments are fundamentally about power, especially in the geopolitical arena. States pursue their interests as states, which may or may not conform to the interests of their people.

The ICANN model offers policy development by functional constituencies as the basis of accountability. This appears to be a good thing: it provides direct representation for civil society and business interests. The problem is that its representational structures are biased in favor of big business interests. Equally bad, its management and staff can short-circuit the so-called bottom up process too easily. And like all self-regulatory agencies, its processes are still not capable of making and implementing policy when there are fundamental disagreements among the stakeholder groups. So we need to face this question: By participating in ICANN in its current form, is CS being co-opted by corporatist models of governance, lending legitimacy to a structure without really influencing it significantly?

There is an equal risk, however, of CS being co-opted by states, especially authoritarian states, which want to subject ICANN and the Internet to national and intergovernmental regimes in order to better control the content and the behavior of users. I doubt if any of us are inspired by the criticisms of the government of China. But even fairly progressive states, such as South Africa, seem more interested in obtaining resources for themselves (e.g., the domain name “southafrica.com” or country names within .info) than in fighting for the interests of ordinary internet users.

This is a real dilemma for progressive forces in civil society. I do not see much evidence that people involved in WSIS and WGIG have thought their way through this. Indeed, some of the leading CS forces in the first phase of WSIS have avoided the IG issue like the plague, during the second phase. But if CS cannot weigh in decisively on the most important, substantive issue raised in the second phase, what can it do?

I reject leaving ICANN as it is and I reject reverting to a purely intergovernmental model. I see three viable proposals for reform. All three are compatible.

1. One solution is to enact a clearer and cleaner functional division between ICANN’s private sector-based coordination and policy development capabilities and the governmental function of providing ultimate accountability and oversight. The United States Government’s supervision authority should be eliminated, but it must be replaced with an internationalized supervisory and dispute resolution process that is minimal and light-handed. In other words there should be a division of labor between governments and ICANN. ICANN can continue to administer Internet resources, but governments would have authority to make sure that it does not abuse a carefully defined and delimited mission, according to some kind of charter or convention agreed internationally. This division of labor, interestingly enough, also implies that we should get rid of ICANN’s

Governmental Advisory Committee (GAC). That's right: the GAC should be eliminated – not because governments should have no role in Internet identifiers, but because GAC represents government involvement in the wrong place and in the wrong way. Governments cannot properly supervise and guarantee accountability for ICANN 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. This is simply common sense. As an example, one cannot expect a government to apply competition law even handedly 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 – and I think they should in some way – they have to get out of its day to day workings. Let governments do what they do best, which is to provide judicial-type public interest determinations within a lawful set of rules.

2. Another solution is to reform ICANN's internal structure, to make it more accountable to its own stakeholder groups and less self-selecting. Bring back elected members of the Board. Revive the At Large not as a multilayered bureaucracy that puts impossible demands on the time and energy of volunteers with small stakes in the management of domains and addresses, but as a membership right that any individual can exercise when it is important to them. This is how the At Large was originally conceived. If there were problems with the first round of elections, fix them. Also reform the representational structure of the GNSO – make it more balanced. One simple and easy way to do that is to permit At Large representatives to vote on the GNSO Council. Another reform is to collapse the business users constituency with the intellectual property constituency, since trademark owners are simply a subset of business users.
3. Institutional competition is another reform that deserves consideration. This is an option for those who can't really make up their minds about the intergovernmental vs. the private sector option. Choose neither, and both: let them compete. Give ITU a part of the IPv6 address space and let them provide an alternative governance structure to ICANN. If ICANN and the Regional Address Registries can create new regional registries such as LACNIC and AfriNIC, there's no reason it cannot also do the same for the ITU. It should also be possible for the ITU to run a supplementary root server system, and thereby give ccTLDs a choice of which regime to participate in. New TLD creation, of course, would have to remain in the ICANN process, but it is perfectly feasible to coordinate an ICANN-administered part of the root zone file with an ITU-administered root zone file, as long as it was perfectly clear which one had authority over which TLD and how registries could elect to move between them. The institutional design should facilitate as much as possible the ability of these two systems of governance to coexist without causing technical compatibility problems. In many respects this is the most radical and the most interesting option. There are conditions under which competing governance systems don't work. I am not convinced that this is one of them.

It is possible for all three of these changes to be made. Realistically, any one of them would be a major change, and thus the likelihood of all three happening is very small. But they are all, I think, good ideas. In conclusion, I would hope to see civil society develop the ability to take specific positions on the issue of ICANN's independence very soon.