



Response to the U.S. Department of Commerce's National Telecommunications and Information Administration's (NTIA) Notice of Inquiry seeking public comment regarding the September 30, 2009, expiration of its Joint Project Agreement (JPA) with the Internet Corporation for Assigned Names and Numbers (ICANN)

Submitted by the Association for Progressive Communications (APC) June 8, 2009

We would like to thank the NTIA for the opportunity to comment on a matter of critical concern for the governance of the Internet and the future of the Internet itself.

The Association for Progressive Communications (APC) is a global network of civil society organisations whose mission is to empower and support organisations, social movements and individuals in and through the use of information and communication technologies for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. APC is incorporated as a Section 501 (3) 3 not-for-profit organisation under California Law and have a presence in more than 40 countries around the world.

Our response to the NOI focuses on the issue of accountability. We recognise that there are many other important considerations, but legitimacy and accountability are at the core of a sustainable ICANN.

1. The DNS White Paper articulated four principles (i.e., stability; competition; private, bottom-up coordination; and representation) necessary for guiding the transition to private sector management of the DNS. Are these still the appropriate principles? If so, have these core principles been effectively integrated into ICANN's existing processes and structures?

The principle 'private, bottom-up coordination' should be replaced by 'multi-stakeholder, bottom-up coordination' which more accurately reflects both the current and ideal situation. The adoption of this principle may have seemed like a good idea in 1998 but it has run its course. As Internet governance evolved, multi-stakeholder participation has assumed greater relevance, and is currently observed successfully in the structure and practices of the Internet Governance Forum (IGF). Private sector leadership as a principle can lead to the misconception that business is always best-placed to regulate itself, which, as we have seen in the case of the financial services sector during the recent crisis, is simply not true.

Moreover, the principle of multi-stakeholder participation was adopted by governments during the the World Summit on the Information Society (WSIS) in 2005 and widely endorsed by business and civil society. The WSIS principles state that 'the international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations'.¹ These internationally accepted principles would help confer legitimacy on ICANN if it adopted them formally and integrated them into its processes and structures.

¹ Tunis Agenda for the Information Society, 2005, paragraph 29

2. The goal of the JPA process has been to transition the coordination of DNS responsibilities, previously performed by the U.S. Government or on behalf of the U.S. Government, to the private sector so as to enable industry leadership and bottom-up policy making. Is this still the most appropriate model to increase competition and facilitate international participation in the coordination and management of the DNS, bearing in mind the need to maintain the security and stability of the DNS? If yes, are the processes and structures currently in place at ICANN sufficient to enable industry leadership and bottom-up policy making? If not, what is the most appropriate model, keeping in mind the need to ensure the stability and security of the Internet DNS?

We are concerned that the model does not adequately institutionalise internal accountability with respect to ICANN's bottom up membership and supporting organisations. Nor does it include adequate external accountability mechanisms that meets the needs of stakeholders outside ICANN. These two factors point to the question of whether ICANN is a democratically accountable institution or not. Below we examine the thread of accountability that has run through the Memorandum of Understanding (MoU) of 1998 and the JPA to support our view that this is a signal weakness in the current ICANN model.

In addition to these accountability issues there is the problem of ICANN's lack of legitimacy in the international sphere. There is widespread concern about the US government's role in overseeing ICANN. EU Commissioner Vivian Reding recently commented to the effect that there should be 'a fully privatised and fully independent ICANN that complies, in its structure as a private corporation, with the best standards of corporate governance, in particular those on financial transparency and internal accountability'.² Reding also proposes that 'all people, companies, bodies or organisations affected by ICANN decisions should have a right to request full judicial review of ICANN decisions by a small, independent international tribunal' and that 'there should be a multilateral forum available for governments to discuss general internet governance policy issues'.

Simply letting the JPA expire will not be sufficient to deal with ICANN's legitimacy in the global context. Neither will continuation. The US government's sole stewardship of ICANN contributes to its lack of legitimacy and could exacerbate global, particularly intergovernmental, tensions around internet governance.

We are of the view that:

- 1) The JPA does need to end and be replaced by an arrangement which is constituted from the outset as international and that clearly frames the principles governing the management of critical internet resources as well as the participation, roles and responsibilities of governments, the private sector, civil society, and the academic and research community.
- 2) The fundamental principle that underpins the JPA has been private sector leadership and management of DNS. We believe this needs to be reconsidered and replaced by a multi-stakeholder framework operating in the public interest.
- 3) ICANN, in spite of the extensive efforts undertaken by its staff and board, has not been able to successfully meet several of the milestones outlined in the JPA annex, of which we feel the issue of democratic accountability is one of the most important.

² http://ec.europa.eu/commission_barroso/reding/video/text/message_20090504.pdf

3. The original agreement and the first six amendments to the JPA contained a series of core tasks, and in some cases, date-specific milestones. Have these tasks been accomplished and have these milestones been met? If not, what remains and what steps should be taken to successfully address them?

During this period ICANN established review mechanisms in the form of the reconsideration policy, independent review policy and Ombudsman. However, the Independent Review Panel may not make any binding decision that ICANN's Board would be obliged to address. The Board is only required to consider the Panel's findings and recommendations. This is an inadequate form of external accountability that we discuss below.

4. In 2006, the focus on specific milestones was adjusted to a series of broad commitments endorsed by the ICANN Board as an annex to the JPA. Specifically, ICANN committed to take action on the responsibilities set out in the Affirmation of Responsibilities established in ICANN Board Resolution 06.71, dated September 25, 2006.12 transparency, accountability, root server security and relationships, TLD management, multi-stakeholder model, role of governments, IP addressing, corporate responsibility, and corporate administrative structure. What steps has ICANN taken to meet each of these responsibilities? Have these steps been successful? If not, what more could be done to meet the needs of the community served in these areas?

The JPA of September 2006 specified that ICANN was to address accountability as follows: "1. To take action on the Responsibilities set out in the Affirmation of Responsibilities established by the ICANN Board in ICANN Board Resolution 06.71, dated September 25, 2006, (Responsibilities) and attached hereto as Annex A." In section 3, The Affirmation of Responsibilities reads: " ICANN shall continue to develop, test, maintain, and improve on accountability mechanisms to be responsive to global Internet stakeholders in the consideration and adoption of policies related to the technical coordination of the Internet DNS, including continuing to improve openness and accessibility for enhanced participation in ICANN's bottom-up participatory policy development processes."

In response to this, ICANN's President's Strategy Committee (PSC) proposed additional accountability mechanisms that allow the community to request the re-examination of a decision by the Board, and, as an ultimate sanction, to remove the Board collectively and reconstitute it. The PSC put this suggestion to the public for comment in its consultation on "Improving institutional confidence in ICANN".

The actions of the PSC in this regard are commendable in that they saw that there was a need for internal accountability of the ICANN Board to its membership in the event of the Board making a decision so egregious that it roiled the membership's confidence in the Board. This so-called nuclear option should be seen as precisely that: a form of ultimate deterrence that hopefully would never be exercised but which would be there for an occasion in which the Board needed to be called to account by the membership. Without an internal accountability mechanism such as this, the Board takes on the character of an elected dictatorship. We discuss this issue further in our response to question 5 below.

In considering the issue of internal accountability, the issue of **multi-stakeholder participation** in ICANN's structures and processes arises, especially with regard to balanced representation of different stakeholders. We note, for example, that the PSC included no one from civil society, while there were representatives of the internet technical community, the private sector and governments. This is a problem as it means that the PSC did not have anyone on the committee who could present the views of civil society on the issue of 'instilling institutional confidence in ICANN'.

Another test case of the ICANN Board's attitude to civil society representation is currently under consideration. This is to do with a process of rebalancing representation of constituencies in the Generic Name Supporting Organization (GNSO). In the GNSO, private sector interests have hitherto dominated. In its response to the review of representation on the GNSO, the Non-Commercial Stakeholder Group has proposed a charter that will re-balance constituencies in the GNSO and increase non-commercial civil society participation.³ This charter is supported by 60 non-commercial organisations including the Association for Progressive Communications.⁴ We respectfully request that the NTIA pay close attention to this proceeding and monitor whether the hopes of non-commercial civil society representation in an important structure of ICANN are advanced or dashed by the ICANN Board. This will, in gambling parlance, constitute a 'tell' as to whether ICANN takes multi-stakeholder bottom-up participation and internal accountability seriously in practice or not.

5. The current JPA called for NTIA to conduct a mid-term review. That review revealed that ICANN needed to take further steps to increase institutional confidence related to long-term stability, accountability, responsiveness, continued private sector leadership, stakeholder participation, increased contract compliance, and enhanced competition. What steps has ICANN taken to address the concerns expressed in the mid-term review process? Have these steps been successful? If not, what more could be done to meet the needs of the community served in these areas?

For reasons outlined below, we conclude that with respect to the accountability thread under the JPA and the mid-term review, ICANN still does not have adequate mechanisms in place to deal with either internal accountability to its membership and supporting organisations, nor with external accountability to stakeholders outside of ICANN who have an interest in the DNS system.

The PSC submitted [the draft Implementation Plan for Improving Institutional Confidence](#) to the Board at ICANN's Mexico City meeting in March 2009.⁵ It was publicly discussed during the meeting. On 6 March 2009, the Board accepted the report and decided to post it for 60 days public comment. The Board also directed staff to evaluate implementation of the proposals and report their findings to the Board. The draft Implementation Plan makes three recommendations regarding internal and external accountability:

RECOMMENDATION 2.7: Seek advice from a committee of independent experts on the restructuring of the review mechanisms to provide a set of mechanisms that will provide for improved accountability in relation to individual rights and having regard to the two proposed further mechanisms below.

RECOMMENDATION 2.8: Establish an additional mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees. For the Governmental Advisory Committee, a consensus statement from all the members present at a physical meeting shall suffice.

RECOMMENDATION 2.9 Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.

ICANN published a staff evaluation of possible implementation steps emerging from the PSC proposals on June 1, 2009, "[Improving Institutional Confidence: The Way Forward](#)".⁶

3 <http://gns0.icann.org/en/improvements/stakeholder-process-en.htm>

4 <http://forum.icann.org/lists/sg-petitions-charters/msg00019.html>

5 <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>

6 <http://www.icann.org/en/announcements/announcement-2-01jun09-en.htm>

Curiously the recommendations 2.7, 2.8 and 2.9 contained in the PSC's Draft Implementation Plan for Improving Institutional Confidence are not present in the staff's proposals. Instead, they recommend that the Board approve changes to ICANN's bylaws to establish a newly constituted Independent Review Tribunal.

When one looks at the structure of the proposed Independent Review Tribunal, it is not that different from the Independent Review Panel. Like the Independent Review Panel, it has limited powers with regard to the ICANN Board: the ICANN Board is not required to accept its findings or recommendations. The only difference is in its composition – requiring the presence of international jurists – and in its terms of reference which are expanded beyond assessing if Board decisions contradict ICANN bylaws. While this is an improvement, the Tribunal still has limited powers. The review process may be independent in that it is conducted separately from the control of the Board, but its recommendations to the Board are not binding. It fails the test of external accountability.

ICANN's stance on the powers of an independent review process are clear from its submission in the ICM Registry, LLC v. ICANN matter currently being heard before the International Centre for Dispute Resolution aka the Independent Review Panel.⁷ ICANN essentially argues that the results of the independent review process are not binding on the ICANN Board because 'the plain language of the IRP provisions, which are set forth in Article IV, section 3 of ICANN's Bylaws, provides that the Panel's declaration is advisory to the ICANN Board and is not binding.'⁸ In its response, ICANN further noted the views of its advisory committee that worked on the development of an independent review process to the effect that 'the ICANN Board *should retain ultimate authority over ICANN's affairs* – after all, it is the Board, not the [independent review panel], that will be chosen by (and is directly accountable to) the membership and the supporting organizations'.⁹

It is interesting that the advisory committee states that the Board 'should retain ultimate authority' over any recommendation from the IRP because it is elected and directly accountable to the membership and the supporting organisations. However as we have noted above, there is no instrument in the Bylaws for the membership and supporting organisations to recall the Board and hold them accountable for any decision the membership may view as contrary to ICANN's mission, values and procedures. The PSC's recommendation 2.8 and 2.9 have been rejected in the staff evaluation and are not being taken forward for ratification at ICANN's meeting in Sydney in June 2009. At the same time the proposal for an Independent Review Tribunal gives the appearance of a dispute resolution mechanism with more teeth than its predecessor the IR Panel – why else call it a 'Tribunal'? But the reality is that this is simply the IR Panel with a strengthened terms of reference and a nod in the direction of international law by including international jurists on the proposed Tribunal rather than a fully fledged external accountability mechanism that can make decisions binding on ICANN's Board. The Bylaws simply do not allow this.

6. The JPA between the Department of Commerce and ICANN is an agreement by mutual consent to effectuate the transition of the technical coordination and management of the Internet DNS in a manner that ensures the continued stability and security of the Internet DNS. Has sufficient progress been achieved for the transition to take place by September 30, 2009? If not, what should be done? What criteria should be used to make that determination?

With regard to accountability, ICANN has not achieved sufficient progress for the transition to take place by September 30, 2009. This problem can be remedied by the following steps:

7 ICANN's Response to Claimants Memorial on the Merits <http://www.icann.org/en/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>

8 ICANN's Response to Claimants Memorial on the Merits, paragraph 78, p 29

9 ICANN's Response to Claimants Memorial on the Merits, paragraph 89, p34

- Recommendations 2.8 and 2.9 of the PSC's [draft Implementation Plan for Improving Institutional Confidence](#) should be ratified by the Board before September 30, 2009.
- Recommendation 2.7 on seeking advice from a committee of independent experts on the restructuring of the review mechanisms to provide a set of mechanisms that will provide for improved accountability should be ratified by the Board before September 30, 2009 and its terms of reference be expanded to specifically examine a viable external accountability mechanism for ICANN, taking into account the issue of ICANN's Bylaws and the demands for the internationalization of ICANN.
- ICANN should be formally recognised as an multi-stakeholder international organisation in terms of an international agreement, anchored within US national law. The PSC proposals to open an ICANN office elsewhere in the world would not be necessary once ICANN's international organisation status was formally agreed.

To formalise the above recognition, and address ICANN's lack of legitimacy in the international sphere, the current administration of the US government is in a unique position to initiate a broader multilateral process to position ICANN as a legitimate international institution. Below are steps that could usefully be pursued in tandem with the JPA expiry in September 2009:

- *Step 1:* An international framework of principles for the management of critical Internet resources is developed with the participation of all stakeholders, drawing on the ICANN experience.
- *Step 2:* Governments agree to this framework in the form of a treaty or some other form of agreement.
- *Step 3:* The IGF's term is extended and it reviews progress periodically.

7. Given the upcoming expiration of the JPA, are there sufficient safeguards in place to ensure the continued security and stability of the Internet DNS, private sector leadership, and that all stakeholder interests are adequately taken into account? If yes, what are they? Are these safeguards mature and robust enough to ensure protection of stakeholder interests and the model itself in the future? If no, what additional safeguards should be put in place?

We think that minimally in the short term that adoption of the PSC recommendations 2.7, 2.8 and 2.9 by the ICANN Board are required as safeguards with respect to external and internal accountability. The adoption of a new process to develop an international intergovernmental framework with the participation of all stakeholders offers the best safeguard for the continued security and stability of the Internet DNS in the long term.

8. The JPA provides that before its termination, NTIA and ICANN are to collaborate on a DNS Project Report that will document ICANN's policies and procedures designed and developed pursuant to the agreement. What should be included in this report?

From our focus on the issue of democratic accountability, the DNS Project Report should document ICANN's policies and procedures with regard to internal and external accountability.

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