

Terminate the Joint Project Agreement with ICANN

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This is in response to the Notice of Inquiry under Docket no. **090420688-9689-01** related to the transition in the management of the Internet's Domain Name System.

Full disclosure: I stand by the statement presented by the Internet Society (ISOC), of which I am a Board of Trustees member.

I am further in cognizance of the hearing before a Committee of the US Congress regarding the same matter, and although I understand that the United States' Department of Commerce's NTIA is independent of that hearing, it may be useful to address some facts and views mentioned in the aforementioned hearing.

During many years, essentially since the foundation of ICANN, I was active in ICANN, initially as a representative to the Non-Commercial Domain-Name Users Constituency (NCDNHC) and then elected to the Board of Directors on several occasions until the end of the term limits applicable, in 2007.

Among other tasks I participated (as chair of Committee) in the Evolution and Reform Process of 2003 and later, during which many of the principles, guidelines, and bylaws of today's ICANN were laid out. At the time, we sought to streamline ICANN's structure making it more effective, establish a governance system that would allow accountability, transparency, commitment of all participants, and mechanisms for appeal and redress on decisions, without detracting from ICANN's ability to act decisively once consideration of all thought, facts, and interests have manifested through the policy development process.

The evolution of ICANN has indeed striven continuously to fulfill the principles articulated in the "DNS White Paper":

a. Stability – the changes made after 2003 contributed to a systemic improvement in the stability of ICANN as a whole, and therefore of the centrally-coordinated functions of the DNS (and other centrally coordinated parameters.) by decreasing dramatically the process uncertainties attendant on the conflicts between competing interests and, what was much worse before the reform, the ability of parties to slow and/or distort ICANN's decisions without a commitment to the result proportional to the ability to shape the process.

b. Competition – competition in the ICANN space can be dealt with in different levels:

- Registrar competition is the most straightforward to establish and it is working. Elements like escrow arrangements for domain name registration data, arrangements to transfer such data between registrars in the event of registrar breakdown (commercial, technical, legal, or otherwise) have been established. The ICANN community, particularly registries and registrars, needed a very long time to become convinced of the need, indeed urgency, of such arrangements, which are now more actively in place.

It should be mentioned that inter-registrar transfers take a long time to start after a failure is detected, because of due-process considerations.

- Competition at the registry level, i.e. between TLDs, is intrinsically difficult. A large literature exists and even that is indecisive. Introducing new TLDs may or may not turn out to induce competition, and certainly competition against “.com” may never be achieved in terms of .com losing market share to a competitor.
 - Competition at other levels does not apply. ccTLDs are a public trust; the views expressed in response to this inquiry by Prof. Milton Mueller, that they should be under national-government authority, is out of place. Introducing competition in the management of ccTLDs would of course be outside the NTIA's purview, but the ICANN system as a whole has a duty of care for the global Internet community that does apply to at least “best practice” sharing among ccTLDs. ccTLD managers are, in their large majority, stalwart members of their communities, principled stewards of the public trust – of the peculiar public trust that accrues in their space, in which the global and local Internet communities converge, and they will always form a robust pillar of the global community in which they engage loyally.
 - Competition in the RIR space is also of only limited application; the public trust, and the high level of coordination and uniqueness of the values associated with IP addressing are being properly addressed in the present dynamic.
 - There is no space for competition in the registration of IETF-originated technical protocol parameters.
- c. Bottom-up coordination. This is an issue in which views, and assessments of fulfillment, are extremely varied. I will discuss it together with:
- d. Representation. The basic principle that has fed ICANN processes with regard to representation has been to make sure all voices are heard. There is fundamentally, structurally, no way at present (and at least for the following decade) that a representative cut can be made of all companies, individuals, civil-society organizations, governments, and so forth, that have a stake in ICANN. There is no way to poll effectively all the inhabitants of Planet Earth, nor of grouping them through elected representatives that still are close enough to matters to understand the crucial feasibility issues that can be vital to resolve.

Therefore, it is the “voices be heard” more than proportionality of representation that are needed. Votes and other forms of proportionality may actually turn out to quash important principles, ideas, and technical knowledge.

It was with that rationale, as well as a knowledge of the imperfect nature of elections in this space due to the fact that the electorate is extremely ill-defined, that it can easily be that “money talks” in “getting out the vote” - very much like peasant participation in some developing-country elections I have known closely in my country and others – that the representation issue has found a good solution in the At-Large structures and organizations of ICANN.

The remaining numerals of the Notice of Inquiry can be addressed globally, in the way the ISOC statement does: there may remain steps to be taken and goals to be achieved. The JPA is not anymore the instrument to ensure either happens. The presence of the JPA deters many international participants from committing further to the ICANN process; and the presence of a governmental backstop prevents even United States-based stakeholders to truly engage, in good faith and without either hesitations or threats, in making ICANN work fully.

The notion of “private sector leadership” has also to be considered in the context of the Notice of Inquiry. From the start in the late 1990's, the ICANN community has regularly struggled with this

concept's intricate implications. It has come to converge on the understanding that both for-profit and not-for-profit interests and principles are espoused under this umbrella term; that a thriving Internet industry worldwide as well as organizations caring for principles like free speech, or development, or subsidiarity, caring for values like freedom, health, relief from hunger, and education, can all come together, around their principles and around their interests, to continue to expand their self-governance. The participation of organizations like ISOC provides guarantees, through their committed engagement, that these processes will be kept on track – with openness, transparency, accountability, commitment to both the process and its result, and in search of effectiveness and optimal use of resources - even in the face of extraordinarily exigent circumstances.

These communities have all come to an agreement with the evolving nature of governmental participation in ICANN. Enlightened governments have come to lead the model in which their involvement is productive, conducive to the furtherance of their national interest yet, in the same line of thought, keeping them away from getting the national interest bogged down in private-sector disputes. The alternative of a framework convention or other steps leading to a traditional, intergovernmental supervisory structure have been discarded by most rational actors and thinkers in the field who understand the ill consequences of such a move.

This innovative set of dynamically evolving arrangements has now become worth the trust of the most demanding of its participants, and can now also call against the resistance of most non-participants to date. There remain actors with little “skin” in the game who can allow themselves the luxury of tossing around theories, sabotaging processes or seeking advantage by making them circuitous and litigious; there is, in other words, “noise” in the process; but that is a signature of ICANN's evolution, of the way it buffers the “noise” and channels good ideas, goodwill, and clarity of interests into more-orderly processes that yield results.

The US Congress hearing mentioned above brought up many questions that surely the NTIA and the whole of the Executive Power of the United States' Federal Government will ponder.

Why is ICANN to be “spun off”, as often asked? This can only be answered in dialogue with the United States. Neither ICANN, nor the Internet, are being taken away from the United States people or their government. That government in fact had the wisdom and foresight, decades ago, to let creative forces thrive in the complex, challenging, global environment of the Internet. US industry, civil society, education, health, and government itself have been steeled by the competition and gained a rightful place for their innovation, inventiveness, and commitment. The US government, its people, its industry, retain all powers to avoid damage to their infrastructure, ability to conduct commerce, capacity to improve their conditions of living, and their national security in a fair, open, continuously evolving environment.

They also had the wisdom and foresight to extricate the United States' people and government from the numerous disputes and liabilities attendant on the governance of the Domain Name System – disputes that seem essential to those businesses which engage in them, but are neither of a scale or a nature that merit the government's involvement. The day-to-day goings-on before courts, alternative dispute resolution mechanisms, global coordination, as well as dealing with the undeniable chicanery and ill will of many actors, occur in a framework that can only be more global to allow the United States', and any other country's, interests to be safeguarded.

The transition of the management of the central coordination of the Domain Name System and attendant parameters to the private sector – in the US as well as in the more-global understanding, and so both to self-regulating private industry and to civil society, academia, the technical community, and governments of all countries – was conceived as a visionary project a bit more than

ten years ago. It is time to complete the project.

Yours,

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