

Before the  
DEPARTMENT OF COMMERCE  
National Telecommunications and Information Administration

Assessment of the Transition of the Technical ) NTIA Docket No.  
Coordination and Management of the ) 090420688-9689-01  
Internet's Domain Name & Addressing System )

**COMMENTS OF MICHAEL PALAGE, ADJUNCT FELLOW  
AT THE PROGRESS & FREEDOM FOUNDATION<sup>1</sup>**

I have been an active participant within the Internet Corporation for Assigned Names and Numbers (ICANN) process since its inception as an intellectual property lawyer and information technology specialist. Over the last ten years, I have served in a number of leadership positions within ICANN, including a three-year term on its Board of Directors (2003-2006).

I applaud the NTIA for using the broad scope of this NOI to refocus the global Internet community on the original intent/focus of ICANN's MoU/JPA with the Department of Commerce (USG). Unfortunately, over the last few years, ICANN has strayed from its narrow mission as the technical coordinating body originally envisioned in the 1998 White Paper, and has instead become a quasi-monopolistic regulator accountable to no one but itself. This NOI provides the global Internet community the opportunity to deconstruct the current "ICANN 2.0" governance model and refocus on a successor "ICANN 3.0" governance model. I submit that ICANN 3.0 needs to be a mix of getting "back to basics" (restoring ICANN's original mission) and implementing important "lessons learned" since ICANN's creation about how to make the organization more effective and accountable. I discuss four broad issues:

- ICANN's Periodic Review of its internal operations and supporting organizations has failed, and has become nothing more than a "perpetual motion machine of public comments and documentation producing no meaningful results." Only a second Evolution and Reform Process can solve ICANN's current deficiencies;
- ICANN must hardcode into its policies and its contracts the principle that its policies cannot supersede national laws;
- ICANN must cease any operational role in technical infrastructure as required by its bylaws and focus instead on its mission as a technical coordinator; and
- Congress must avoid "kicking the JPA can down the road" and instead provide much-needed leadership by creating a solid foundation for ICANN 3.0 in legislation after proper consultation with the Government Accountability Office.

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1. The views expressed herein are the author's own, and are not necessarily the views of the PFF board, fellows or staff.

## ICANN's Previous Evolution & Reform Process

In 2002-2003, ICANN conducted an extensive “Evolution & Reform” process, whereby the broader Internet community engaged in constructive, if heated, debate, on the future evolution of ICANN.<sup>2</sup> This process resulted in substantive changes (creating ICANN 2.0), including a reduction in the size of the ICANN Board; the addition of new bodies such as the Country Code Name Supporting Organization (ccNSO) and the At Large Advisory Committee (ALAC); the removal of one of the original Supporting Organizations, the Protocol Supporting Organization (PSO); and a host of other substantive changes.

Also incorporated into the amended bylaws of ICANN 2.0 was a provision that called for the periodic review of the various organizations within the ICANN structure. While a few organizations were specifically required to be reviewed, the ICANN Board was left free to designate the review of any organization within ICANN's complicated structure. ICANN has repeatedly cited its use of this discretionary review mechanism as proof that it has completed the necessary steps to ensure its future evolution in a predictable fashion—and to free the organization of its obligations under the MoU/JPA. In fact, Paul Twomey, ICANN's President and CEO, recently touted this process as “built into the DNA of ICANN as an institution” and as superior to other international entities—particularly ones founded by treaties because they are “products of their time and to change them over time becomes very difficult. Both because of founding constitutional instruments and also because the deal is done at a certain stage this it is hard to change the power structure.”<sup>3</sup>

### A. The Ineffectiveness of ICANN's Periodic Review

The principle of the periodic three year review incorporated into ICANN's bylaws as part of the Evolution and Reform process sounds ideal in principle, but in practice, it has been largely ineffective. Instead of providing for an evolving ICANN structure, these periodic three year reviews have proven nothing more than a perpetual motion machine of public comments and documentation producing no meaningful structural or operational changes.

Nothing more clearly illustrates ICANN's inability to implement the Periodic Review process in a timely fashion than its failure to comply with Article IV Section 4 of the ICANN Bylaws:

The first of such [Independent Reviews], to be initiated no later than 15 December 2003 and to be completed in time for Board consideration at ICANN's annual meeting in 2004, shall be of the GNSO Council and the ICANN Root Server System Advisory Committee. The second of such reviews, to be initiated no later than 15 November 2004 and to be completed in time for Board consideration at ICANN's annual meeting in 2005, shall be of the ccNSO, the ccNSO Council, and such other organizations as the Board may designate.<sup>4</sup>

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2. See Committee on ICANN Evolution and Reform, [www.icann.org/en/committees/evol-reform/](http://www.icann.org/en/committees/evol-reform/).

3. Interview with Paul Twomey, *On The Record with Paul Twomey of ICANN*, San Francisco Chronicle, May 9, 2009, [www.sfgate.com/cgi-bin/blogs/chroncast/detail?entry\\_id=39589](http://www.sfgate.com/cgi-bin/blogs/chroncast/detail?entry_id=39589) (5:30 time marker -65:10).

4. Bylaws of ICANN, last amended March 20, 2009, Article IV, Sec. 3, at <http://www.icann.org/en/general/bylaws.htm> [hereinafter *ICANN Bylaws*].

The first Independent Review process of an ICANN supporting organization conducted under this provision was indeed that of the Generic Names Supporting Organization (GNSO) Council. But this review was not initiated until mid-October 2004, nearly one year later than required by the bylaws.<sup>5</sup> This report was completed and posted for public comment in December 2004.<sup>6</sup> However, the ICANN Board never took any specific action on the report, instead launching a new review of the entire GNSO structure during its Luxemburg regional meeting in July 2005.<sup>7</sup>

That review and implementation process will soon be entering its fourth year. (This is not a “process” but a saga!) While the most recent target for completion was ICANN Board’s 2009 annual meeting, there are growing signs that this goal will also not be met. These protracted and serious delays involving just one of ICANN’s many Supporting Organizations demonstrate the shortcomings of the Periodic Review process to date.

Further proof of ICANN’s failure to comply with its own bylaws is evidenced by its failure even to *commence* a review of the ccNSO, which the ICANN Bylaws required ICANN to initiate by November 15, 2004 and complete by December 4, 2005. On December 8, 2006—*two years* after the initiation of the ccNSO review was required by the bylaws—the ICANN Board finally approved a resolution stating that the ccNSO review would commence by July 2008 (2.5 years late).<sup>8</sup> Unsurprisingly, ICANN also missed that deadline, and has now simply stated that the ccNSO review “will commence in the near future.”<sup>9</sup>

A timely independent review of the ccNSO’s structure and operation is critical given financial documents recently released by ICANN showing a \$7.4 million difference between the cost of services provided to the ccNSO, and the revenue collected by ICANN from it. Specifically, the ICANN Expenditure Analysis by Stakeholder Interest Area shows a \$9 million outlay for ccNSO support in fiscal year budget 2010.<sup>10</sup> However, ICANN’s proposed 2010 budget (yet to be approved) projects only \$1.6 million in revenue from the ccNSO—a 30% **reduction** from the 2009 budget.<sup>11</sup> This substantial subsidy of ccNSO operations from gTLD revenues is a growing concern and appears to conflict with the 2000 GAO Report’s statement that ICANN was required to operate on a cost recovery basis for the services it provides.<sup>12</sup>

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5. Special Meeting of the Board Minutes, Oct. 18, 2004, [www.icann.org/en/minutes/minutes-18oct04.htm](http://www.icann.org/en/minutes/minutes-18oct04.htm).

6. See Independent GNSO Council Review, <http://gnso.icann.org/announcements/announcement-22dec04.htm>.

7. See ICANN Board Meeting, Luxembourg Approved Resolutions, July 15, 2005, [www.icann.org/en/minutes/resolutions-15jul05.htm](http://www.icann.org/en/minutes/resolutions-15jul05.htm).

8. See Regular Meeting of the Board Minutes, Dec. 8, 2006, [www.icann.org/en/minutes/minutes-08dec06.htm](http://www.icann.org/en/minutes/minutes-08dec06.htm).

9. ICANN Organizational Reviews, Mar. 20, 2009, [www.icann.org/en/reviews/](http://www.icann.org/en/reviews/).

10. See ICANN Expenditure Analysis: by Stakeholder Interest Area, May 2009, at 8, [www.icann.org/en/financials/eag-analysis-29may09-en.pdf](http://www.icann.org/en/financials/eag-analysis-29may09-en.pdf).

11. See Draft FY10 Operating Plan and Budget, May 17, 2009, at 15, [www.icann.org/en/financials/proposed-opplan-budget-v1-fy10-17may09-en.pdf](http://www.icann.org/en/financials/proposed-opplan-budget-v1-fy10-17may09-en.pdf).

12. See Government Accountability Office, *Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers*, July 7, 2000, [www.gao.gov/new.items/og00033r.pdf](http://www.gao.gov/new.items/og00033r.pdf).

The fact that statistics continue to show a growing ccTLD domain name market in direct competition with gTLD domain names is additional cause for concern, particularly since ICANN has failed to conduct the “full market” study that Paul Twomey represented to the community would be undertaken during the ICANN Annual meeting in 2006.<sup>13</sup> Even ICANN’s own economic expert, Dennis Carlton, has stated that this promised full market analysis would be an “interesting question deserving of analysis.”<sup>14</sup> But it appears that we will have to continue waiting—a delay of nearly *three years*, which just so happens to be on par with the delay of the ccNSO Independent Review.

To summarize, ICANN has commenced five reviews over the last six and half years involving the following organizational bodies: the Generic Names Supporting Organization (GNSO); the Nominating Committee; the At-Large Advisory Committee (ALAC); DNS Root Server Advisory Committee; and the Security and Stability Advisory Committee (SSAC). While there have been plenty of reports and public comment periods, ICANN has made few, if any, substantive changes in response. This calls into question the efficacy of the entire periodic review process.

Pure common sense demands that, before setting ICANN free of its obligations under the MoU/JPA, the USG must ensure that deliverables demanded by these Periodic Review processes are actually being delivered. Instead, in ICANN’s haste to escape the JPA, the organization points to its completed reports and subsequent public comments and declares “*Mission Accomplished!*” without having fully implemented the changes recommended in those reports. As the old saying goes: Actions speak louder than words, and unfortunately there have been too many words and too little action in this process.

ICANN will likely, and predictably, respond by pointing to the recent appointment in October 2008 of Marco Lorenzo as Director of Organizational Reviews, and further claim that the absence of such a director explains ICANN’s failure to timely implement the outcomes of past reviews, and that he will address these past failures in the “near foreseeable future.” Lorenzo does, indeed, appear to be doing a good job trying to get this “Periodic Review” ship righted and headed in the proper direction. But ICANN has long explained its failures by claiming that it lacked the staff and resources to do better. ICANN’s “The Dog Ate My Homework” story is simply no longer credible, since ICANN has now been operated with an annual budget in excess of \$24 million year and a staff of over fifty (counting consultants) since 2006.

## **B. A Second ICANN Evolution and Reform Process is Needed**

A substantive debate among the global Internet community about the future evolution and reform of ICANN is long overdue, and the current periodic three year review process is an inadequate mechanism to address the serious issues that have arisen over the past six years. During this time, ICANN has transformed itself from a humble technical coordinating body with an annual budget of approximately \$8 million into a quasi-monopolistic regulator with an

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13. ICANN Meetings in São Paulo, Brazil, Dec. 8, 2006, [www.icann.org/en/meetings/saopaulo/captioning-board-old-08dec06.htm](http://www.icann.org/en/meetings/saopaulo/captioning-board-old-08dec06.htm).

14. Report of Dennis Carlton Regarding ICANN’s Proposed Mechanism for Introducing New gTLDs, June 5, 2009, [www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf](http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf).

annual budget likely to exceed \$100 million in the next few years. The ICANN Board needs to address the growing lack of confidence among the broader Internet community created by ICANN's broken promises, particularly among those ICANN stakeholders that have been doing some of the heaviest lifting in this area before there even was an ICANN.

In fact, conducting a second "Evolution and Reform" process is probably the best way for ICANN's incoming CEO to learn the dynamics of the organization and to bring their organization and leadership skills to bear on the serious challenges facing ICANN.

### **ICANN's Policies & Contracts Cannot Supersede National Laws**

One of the major obstacles impeding broader recognition of ICANN's technical coordinating function within the broader Internet community is the political optics of ICANN having the ability to impose policies upon TLD operators that potentially conflict with the laws of the country in which they operate. The simplest way to address this situation is to hard-code into the ICANN Bylaws and all TLD agreements an unequivocal provision that ICANN's policies may not supersede national law. In fact, such a provision would merely render unambiguous ICANN's existing obligation, under its Articles of Incorporation, to operate "in conformity with relevant principles of international law and applicable international conventions and local law."<sup>15</sup>

The NTIA need look no further than the comments of SWITCH, the Swiss Academic Network, on the NTIA's NOI. As the registry operator of the .CH (Switzerland) and .LI (Liechtenstein) ccTLDs, SWITCH declared that:

From a legal standpoint it is difficult for us to participate in ICANN: On one hand we have to abide by Swiss national law and on the other by contractually enforced international standards set by ICANN. In case of conflict we have to quit any participation in ICANN.<sup>16</sup>

With regard to the potential optics of ICANN's policy regulatory authority exceeding its stated narrow technical mandate, SWITCH also stated that:

ICANN has become over the years a "Shadow Internet Government"; a private body in California [sic] is neither prepared nor capable to perform such powerful activities.<sup>17</sup>

ICANN has generally avoided policy development in the area of ccTLDs, in part because of the ccTLD registries' strong belief that they "should be operated at a local level, to meet the needs of the local Internet community within the framework of the relevant laws and regulations as

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15. Articles of Incorporation of ICANN, last revised Nov. 21, 1998, [www.icann.org/en/general/articles.htm](http://www.icann.org/en/general/articles.htm) [hereinafter *ICANN Articles*].

16. Comments of SWITCH NTIA on Notice of Inquiry regarding expiration of JPA with ICANN and DoC, June 2, 2009, [www.ntia.doc.gov/comments/2009/dnstransition/010.pdf](http://www.ntia.doc.gov/comments/2009/dnstransition/010.pdf).

17. *Id.*

imposed by the [local] Authorities.”<sup>18</sup> However, ICANN has been inconsistent in its approach to making policies for gTLDs policies and the possibility that such policies might conflict with the national laws and regulations that govern gTLD registries, as illustrated by the following examples.

#### **A. TELNIC & .TEL**

The first involves TELNIC, the registry operator of the .TEL TLD, which sought to modify its existing WHOIS contractual obligations to comply with UK law. This request was submitted to ICANN by TELNIC after consultation with the Information Commissioner’s Office (ICO), which oversees and enforces the European Union’s Data Protection Directive in the UK. TELNIC utilized the Registry Services Evaluation Process<sup>19</sup> (aka the Funnel) to request a modification of its contractual requirements by offering a proposed new registry service to address the concerns of the ICO to bring it into compliance with UK national law. This initial request was filed in April of 2007, however, this final contractual approval was not granted by the ICANN Board until December 2007.

The awkward and potentially illegal situation of TELNIC operating in potential violation of UK national law, while ICANN pondered an amendment to its registry contract for approximately eight months, was somewhat mitigated by the fact that TELNIC was then not yet operational. But the “ad hoc behavior”<sup>20</sup> that ICANN demonstrated in this affair could have potentially had a much greater impact on an operational registry seeking to operate in compliance with relevant national law.

#### **B. The Universal Postal Union & .POST**

Perhaps more troubling is the ICANN Board’s position with regard to the negotiations between ICANN and the Universal Postal Union (UPU) in connection with the .POST TLD.<sup>21</sup> The UPU was one of only two applicants in the 2004 sponsored TLD application round in which all three evaluation panels initially approved the UPU’s application. Notwithstanding this fact, the UPU and ICANN have, in the subsequent *five years*, been unable to mutually agree to a registry agreement that will permit the .POST TLD to be added to the Root. Recognizing some of the unique situations that were attendant to the UPU’s status as an Intergovernmental

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18. Exchange of letters between the Istituto di Informatica e Telematica of CNR (IIT-CNR) and ICANN, [www.icann.org/en/cctlds/it/it-icann-letters-31oct07.pdf](http://www.icann.org/en/cctlds/it/it-icann-letters-31oct07.pdf).

19. See Registry Services Evaluation Process, [www.icann.org/en/registries/rsep/](http://www.icann.org/en/registries/rsep/).

20. In the ICANN Board minutes for 18 Dec 2007, ICANN Board director Susan Crawford described ICANN’s actions in connection with this registry request as “ad hoc behavior.” Several other directors voiced their concerns as well with regard to the fairness of the process, prompting ICANN CEO to ask the specific question as to “what element of the process were noted as allegedly unfair.” See Minutes for the Special Meeting of the ICANN Board of Directors, Dec. 18, 2007, [www.icann.org/en/minutes/minutes-18dec07.htm](http://www.icann.org/en/minutes/minutes-18dec07.htm).

21. In the spirit of openness and transparency, the author has previously served as a consultant to the UPU in connection with its efforts to conclude an agreement with ICANN. The author’s comments and opinion are in a purely personal capacity and should not be attributed in any fashion to the UPU. Finally, any statements made in connection with the .POST contractual negotiations are based upon documents and statements in the public domain.

Governmental Organization (IGO), the UPU submitted a detailed memorandum to the ICANN community in September of 2007.<sup>22</sup>

One of the key issues that the UPU raised in this communication was the need for a consensus policy safe harbor provision. Specifically, “neither the UPU nor its member countries could be placed in a situation where a potential ICANN policy might conflict with the UPU Acts, UPU Regulations or other UPU policies applicable to the postal sector.”<sup>23</sup> This safe harbor provision was neither new nor revolutionary. In fact, the UPU specifically cited to a similar safe harbor provision that was included in the .EU registry agreement, which had previously been agreed to by the ICANN Board and which read, in relevant part:

The Registry may not comply with that specification or policy if it can demonstrate that it is in conflict with the law of the Governmental Authority or the Governmental Communication.<sup>24</sup>

However, the ICANN Board does not appear to have publicly addressed this issue until its July 31, 2008 Board meeting, during which no formal resolution was passed, but the published minutes of which reflect the following text, which appears to reject the UPU’s request:

The Chair asked if there was anything the Board could do to help. The Chair also noted the sense of the Board that all registries must continue to be bound to consensus policy. Kurt noted that the sense of the Board that gTLD registries must comply with consensus policies as a cornerstone to ICANN's mission has been helpful in negotiations....

The Chair closed with a comment that instructions from the Board on consensus policy compliance has been clear, and that staff should come back to the Board if it needs more help or if there is progress to report.<sup>25</sup>

This misrepresents ICANN’s guiding documents in two respects. First, the statement that all gTLD registries must comply with consensus policies is not entirely accurate, as gTLDs such as .MIL, .GOV, .INT, and .EDU are not required to comply with consensus policy.<sup>26</sup> Second, the ICANN Board’s apparent refusal to address the limitations imposed upon the UPU as a result of

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22. See .POST Sponsorship Agreement - Information Document, Sept. 5, 2007, [www.icann.org/correspondence/donohoe-to-pritz-05sep07.pdf](http://www.icann.org/correspondence/donohoe-to-pritz-05sep07.pdf).

23. *Id.* at 11 (or PDF page 13).

24. .EU ccTLD Registry Agreement, [www.icann.org/en/cctlds/eu/eu-icann-ra-23jun05.pdf](http://www.icann.org/en/cctlds/eu/eu-icann-ra-23jun05.pdf).

25. Minutes of the Special Meeting of the ICANN Board of Directors, July 31, 2008, [www.icann.org/en/minutes/minutes-31jul08.htm](http://www.icann.org/en/minutes/minutes-31jul08.htm).

26. According to the ICANN website ([www.icann.org/en/registries/about.htm](http://www.icann.org/en/registries/about.htm)) a list of gTLDs is available at this URL [www.iana.org/domains/root/db/](http://www.iana.org/domains/root/db/), however, this URL appears to include a list of all TLDs appearing in the root zone. This archival copy of the IANA website at archive.org more easily shows the identification by IANA of .MIL, .GOV, .EDU and .INT as gTLDs, see IANA | Generic Top-Level Domains, [web.archive.org/web/20071027110209/www.iana.org/gtld/gtld.htm](http://web.archive.org/web/20071027110209/www.iana.org/gtld/gtld.htm).

its treaty obligations to 191 member countries is inconsistent with Article 4 of ICANN's Articles of Incorporation, which states that:

[ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities **in conformity with relevant principles of international law and applicable international conventions and local law** and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, [ICANN] **shall cooperate as appropriate with relevant international organizations.**<sup>27</sup>

The net result of the ICANN Board's apparent failure to grant the UPU (the proposed sponsor of the .POST TLD) a safe harbor provision modeled after the one incorporated into the .EU agreement, is to deny the UPU, its 191 members countries, and their Designated Operators the ability to fully carry out their respective postal service obligations set forth in the Postal Treaty. This is particularly troubling given the recognition in the WSIS outcome document of the postal sectors role as a "key actor in the Information Society."<sup>28</sup>

Perhaps even more telling of ICANN's ability to say one thing and do another is contained in its recently released document *Improving Institutional Confidence: The Way Forward*, in which ICANN states that:

The Board should consider the exploration of how the practice of issuing a formal and detailed response to GAC communiques can be done in a timely way.<sup>29</sup>

What is sadly ironic about this statement is that it appears that ICANN has failed to respond to two 2009 inquiries from Edouard Dayan, Director General of the UPU International Bureau, in connection with the .POST negotiations,<sup>30</sup> and to the GAC Mexico City Communiqué, which stated:

Experience from the 2003 round of new gTLDs leads the GAC to propose that, in specific cases, when the applicant is an intergovernmental organization bound by treaty obligations, the relevant adjustments should be made to standard ICANN contractual provisions in order to ensure that public international law is fully respected by ICANN contractual arrangements and policies.

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27. *ICANN Articles, supra note 15* (emphasis added).

28. UPU and .POST negotiations, Mar. 30, 2007, [www.icann.org/correspondence/dayan-to-twomey-30mar07.pdf](http://www.icann.org/correspondence/dayan-to-twomey-30mar07.pdf).

29. <http://www.icann.org/en/jpa/iic/iic-the-way-forward-31may09-en.pdf>.

30. Dayan to Dengate-Thrush, Feb. 11 2009, [www.icann.org/correspondence/dayan-to-dengate-thrush-11feb09-en.pdf](http://www.icann.org/correspondence/dayan-to-dengate-thrush-11feb09-en.pdf); Dayan to Dengate-Thrush, April 8, 2009, [www.icann.org/correspondence/dayan-to-dengate-thrush-08apr09.pdf](http://www.icann.org/correspondence/dayan-to-dengate-thrush-08apr09.pdf).

In this regard, the GAC noted with concern the extended delay in the completion of contract negotiations with the Universal Postal Union for the .post sTLD, and urges ICANN to quickly conclude negotiations in line with the above principles.<sup>31</sup>

In the case of .POST, ICANN's inaction speaks louder than its words.

### C. Accountability Mechanisms Needed

Given ICANN's unique role as the apparent exclusive body to make requests to the USG for including new TLDs into the root (a critical Internet infrastructure component) the broader Internet community needs to be asking questions about suitable accountability mechanisms when the actions/inaction of ICANN prevent an IGO from fulfilling its obligations to its member countries. While this debate may be carried out in various international fora, in order to prevent such an impasse from occurring in the future, ICANN ought to hard-code into its proposed gTLD registry agreement<sup>32</sup> a specific recognition that any party to an agreement with ICANN is provided a policy safe harbor provision when an ICANN consensus policy conflicts with "international law and applicable international conventions and local law" that are binding on that party.

### A Technical Coordinating Body, *Not* an Infrastructure Operator

The ICANN bylaws are unwavering in defining ICANN's mission. Article I, Section 1 sets forth in clear and unambiguous language that it is ICANN's mission to:

- **"Coordinate"** the allocation and assignment of unique identifiers;
- **"Coordinate"** the operation and evolution of the DNS root name server system; and
- **"Coordinate"** policy development reasonably and appropriately related to these technical functions.<sup>33</sup>

However, under the auspices of promoting the "security and stability" of the Internet and buttressed by an ever-increasing annual budget, ICANN has exceeded its limited role as a coordinator of these key Internet resources by arrogating to itself a managerial role in the technical operation of these resources.

Dr. Hamadoun Touré, Secretary General of the International Telecommunication Union (ITU), recently reminded the broader Internet community of the need for a global coordinating body to firewall itself from the operation of the infrastructure and assets that it is supposed to be coordinating.<sup>34</sup> But rather than seeking to phase-out its hands-on operation of such key

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31. GAC Mexico City Communiqué, <http://old.gac.icann.org/web/communiqués/gac33com.pdf>

32. See New gTLD Agreement: Proposed Draft, Oct. 24, 2008, [www.icann.org/en/topics/new-gtlds/draft-agreement-24oct08-en.pdf](http://www.icann.org/en/topics/new-gtlds/draft-agreement-24oct08-en.pdf)

33. *ICANN Bylaws*, *supra* note 4.

34. Speech at the ICANN regional meeting in Cairo, Egypt, Nov. 6, 2008, <http://cai.icann.org/files/meetings/cairo2008/toure-speech-06nov08.txt> ("ITU is not doing any operational issues."; "They also charge us with facilitating on key issues of interest to our members, such as IDN and the global management resources, but not at operational level."; "There is one clear limitation for ITU. We don't do operational matters. No.").

Internet infrastructure such as the .INT and .ARPA registries and the Root L server, ICANN recently proposed to substantially expand its operational role by signing the root zone.<sup>35</sup> Fortunately it appears that ICANN has back off from this "power grab" and is now looking to work in collaboration with the USG and VeriSign on the goal of an operationally Signed Root Zone as soon as feasible in 2009.<sup>36</sup>

ICANN's hands-on technical operation of these critical Internet resources is not only inconsistent with its declared mission as a global "coordinating" body, but appears in some cases to be on its face a clear violation of the ICANN Bylaws. Specifically, ICANN currently serves as the Registry Operator of the .INT and .ARPA gTLDs as part of the IANA contract. But Article II, Section 2 of the ICANN Bylaws state that "ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN."

Even more troubling is the authority under which ICANN/IANA operate the Root L server. As evidenced by an email communication between former ICANN Board member Karl Auerbach and Brendon Johnson, Contracting Officer from the Department of Commerce, the operation of the Root L server does not appear to be part of the IANA contract.<sup>37</sup> In the absence of any clear authority requiring ICANN/IANA to operate the Root L server, ICANN should follow the basic precepts of proper corporate governance and not undertake a responsibility not within its charter. ICANN should instead focus its resources on finding a suitable, technically qualified trustee to operate the Root L server. Ideally, this trustee would add to the current geographic diversity of these key Internet resources.

While the broader Internet community appreciates the many operational and coordinating roles that ICANN served during its formative years, the time has now come for ICANN, maturing into a global coordinating body, to give up hands-on technical operation of these key Internet resources and instead focus on its coordinating responsibilities. ICANN's current Bylaws require nothing less. This bifurcation of responsibilities is not only prudent from a governance standpoint, but would also remove the conflict of interest created when ICANN seeks to coordinate the actions of both others and itself in connection with the operation of these critical Internet resources.

## **Restructuring ICANN's Supporting Organizations**

One of the problems with ICANN's current approach of re-evaluating each organization within the ICANN structure on a periodic rotating basis is that it does not provide an opportunity for a holistic review of the organization as a whole. Instead, the current approach only reinforces ICANN's current organizational silos, and does not provide for a clean slate review of the entire

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35. See ICANN Proposal to DNSSEC-Sign the Root Zone, Sept. 15, 2008, [www.icann.org/en/announcements/dnssec-proposal-09oct08-en.pdf](http://www.icann.org/en/announcements/dnssec-proposal-09oct08-en.pdf). ICANN and VeriSign have jointly proposed to sign the root zone. See also Press Release, ICANN, *Proposal To Sign the Root Zone Made Public*, Oct. 9, 2008, [www.icann.org/en/announcements/announcement-2-09oct08-en.htm](http://www.icann.org/en/announcements/announcement-2-09oct08-en.htm).

36. See <http://www.icann.org/en/announcements/announcement-2-03jun09-en.htm>

37. See L Root Server and IANA RFI, Mar. 6, 2006, [www.cavebear.com/cbblog-archives/000237.html](http://www.cavebear.com/cbblog-archives/000237.html).

organization to see if certain silos need to be added or removed. For example, ICANN’s first evolution and reform process eliminated the Protocol Supporting Organization (PSO) and added the Country Code Name Supporting Organization (ccNSO).

If ICANN were to finally conduct a long-overdue second evolution and reform process, it would realize that the current delineation between the Generic Name Supporting Organization and the Country Code Supporting Organization no longer scales. Instead, ICANN needs to develop a Supporting Organization hierarchical structure where the delineation is based upon the nature of the contracting party itself: private (for profit/not-for-profit/cooperative) versus public (governmental/intergovernmental).

### A. Public TLD-Supporting Organization

To quell the fears of some of the larger private ccTLD operators (e.g., Nominet, DENIC), all existing and future IDN/ASCII ccTLDs would reside within the “Public” house. This delineation is based upon the fact that ICANN’s Government Advisory Committee (GAC) has recognized in its Operating Principles that:

Country code top level domains are operated in trust by the Registry for the public interest, including the interest of the Internet community, **on behalf of the relevant public authorities including governments, who ultimately have public policy authority over their ccTLDs**, consistent with universal connectivity of the Internet.<sup>38</sup>

The following excerpts from the GAC Principles & Guidelines for ccTLDs further recognize and reinforce this logical delineation.<sup>39</sup>

1.2. The main principle is the principle of subsidiarity. ccTLD policy should be set locally, unless it can be shown that the issue has global impact and needs to be resolved in an international framework. Most of the ccTLD policy issues are local in nature and should therefore be addressed by the local Internet Community, according to national law.

\* \* \*

1.6. It is recalled that the Governmental Advisory Committee (GAC) to ICANN has previously adopted the general principle that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest. The WSIS Declaration of December 2003 states that “*policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.*” This is in the context that, “*Governments, as well as private sector, civil society and the United Nations and other international organizations have an important role and responsibility in the development of the Information Society and,*

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38. [www.gac.icann.org/index.php?name=Imp\\_doc](http://www.gac.icann.org/index.php?name=Imp_doc) (“Operating Principles”) (emphasis added).

39. [www.gac.icann.org/index.php?name=Imp\\_doc](http://www.gac.icann.org/index.php?name=Imp_doc) (“Principles & Guidelines for ccTLDs”).

*as appropriate, in decision-making processes. Building a people-centred Information Society is a joint effort which requires cooperation and partnership among all stakeholders.”*

1.7. It is recalled that the WSIS Plan of action of December 2003 invites “Governments to manage or supervise, as appropriate, their respective country code top-level domain name”. Any such involvement should be based on appropriate national laws and policies. It is recommended that governments should work with their local Internet community in deciding on how to work with the ccTLD Registry.

\* \* \*

#### **4.1 Principles**

4.1.1. Ultimate public policy authority over the relevant ccTLD rests with the relevant government or public authority; how this authority is exercised is determined by applicable law.

4.1.2. Every country or distinct economy with a government or public authority (sic) recognised in accordance with article 3.8 above should be able to ask for its appropriate country code to be represented as a ccTLD in the DNS and to designate the Registry for the ccTLD concerned.

\* \* \*

5.1.2. In performing their functions ccTLD Registries are subject to applicable law.

The Public TLD Supporting Organization proposed herein would encompass not only ccTLDs, but also any TLDs operated by governmental or intergovernmental bodies such as .GOV, .MIL, .EDU, *etc.*, despite their current gTLD designation. Moreover, any future gTLD in which the TLD sponsor/operator is a governmental or intergovernmental body would also qualify for inclusion within this newly proposed Supporting Organization.

While ICANN has historically avoided policy development governing ccTLDs, under a proposed ICANN 3.0 governance structure, it would be hard-coded into ICANN’s bylaws or constitution that the organization would be prohibited from imposing policy that would potentially conflict the national law of a TLD operator within the Public TLD Supporting Organization. This approach would be consistent with the following language that ICANN incorporated into the .EU TLD registry agreement:

The Registry may not comply with that specification or policy if it can be demonstrate that it is in conflict with the law of the Governmental Authority or the Governmental Communication.<sup>40</sup>

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40. .EU ccTLD Registry Agreement, <http://www.icann.org/en/cctlds/eu/eu-icann-ra-23jun05.pdf>.

This approach would also be consistent with representations made by ICANN staff during the recent implementation process for new gTLDs recognizing that TLDs involving governmental/intergovernmental bodies might require modification to the baseline registry agreement. For example during the new gTLD consultation session in New Delhi India, Kurt Pritz, ICANN's Senior Vice President of Services, stated "[t]here might have to be some variation working with governments or IGOs because of their restrictions in choice of law or something like that."<sup>41</sup>

### **B. Private TLD-Supporting Organization**

All private TLD sponsors/operators would reside within the Private TLD-Supporting Organization with a scope similar to the old DNSO and current GNSO regarding policy formulation. The only exception would be another provision, hard-coded in the ICANN bylaws or constitution, to deal with ICANN policy that potentially conflicts with the national law of a TLD operator. Unlike in the absolute ban on such policy-making in the Public TLD-Supporting Organization, the Private TLD operator would have to notify their GAC representative of the potential or actual conflict with their national laws and then engage in discussion with ICANN to find a suitable resolution. During the pendency of these negotiations, the Private TLD Operator would be exempt from compliance and would not be in violation of its registry agreement.

### **Conclusion: A Necessary Legislative Foundation for ICANN 3.0**

The simplest course of action would be to get all parties to extend the MoU/JPA. But doing so would merely be to "kick the can down the road"—indeed, the same can it has been kicked down for the past ten years. The NTIA and Congress need to cease delaying the difficult decisions that must be made to provide a long term solution to ICANN's Governance and accountability dilemma. While a short-term extension of the MoU/JPA framework may be necessary, Congress should pass legislation that would address the following issues.

#### **A. Step 1: Congress Should Request the General Accountability Office to Conduct a Report**

The General Accountability Office (GAO) is the ideal candidate to undertake an analysis of a number of legal issues surrounding ICANN governance and accountability, given its well-established reputation for independent analysis and prior experience studying these matters—especially its detailed 2000 analysis of the early stages of DoC's relationship with ICANN.<sup>42</sup>

In conducting a new study, GAO ought to consider the following issues:

- Since the original 2000 GAO report on ICANN, ICANN's annual budget has skyrocketed to more than \$67 million. That budget is set to grow significantly once ICANN begins accepting applications for new gTLDs on a large scale: Using ICANN's own projections of new gTLD applicants and the minimum fees that will be assessed suggests that ICANN's annual budget will soon exceed \$100 million. As ICANN's

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41. GNSO Working Group, Jun. 22, 2008, <https://par.icann.org/files/paris/Paris-GNSO-22JUN08am.txt>.

42. GAO, *Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers*, July 7, 2000, available at <http://www.gao.gov/new.items/og00033r.pdf>.

budget grows, one must ask: Are these fees-paid by largely gTLD registrants, registrars, and registries-consistent with the GAO's conclusion in its 2000 report that ICANN is limited to recovering only actual costs (because "ICANN is a project partner with the Department under the memorandum of understanding, and it is the Department's policy to allow project partners to recover only actual project costs"<sup>43</sup>)?

- If ICANN walked away from the MoU/JPA without the USG formally acknowledging that ICANN had successfully fulfilled its obligations under the agreement, would ICANN be able to rely upon its existing contracts with registry operators to continue collecting fees?
- In its 2000 report, the GAO asked whether the DoC "had the authority to transfer control of the authoritative root server to ICANN." The GAO did not definitively answer this question, but concluded that it was "uncertain whether transferring control would involve the transfer of government property to a private entity" thus giving rise to implications involving the Property Clause of the U.S. Constitution, which requires statutory authority for the disposal of government property.<sup>44</sup>
- The GAO investigated, but did not resolve, whether an act of Congress would thus be required to transfer control of the root server to ICANN. But GAO did not undertake the same analysis as to whether the contractual rights associated with the top-level domains themselves constituted "government property" requiring Congressional action for any transfer to ICANN. This may have been because U.S. courts had, at that time, held that domain names were not "property" in general, but simply a contractual right to a service provided by the registration authority. But this potentially changed with the Ninth Circuit's 2003 decision in *Kremen v. Network Solutions* concerning SEX.com. Thus, if the GAO now concludes that ICANN's gTLD contracts with registry operators involve property rights and that statutory authority would be required for the DoC to transfer these rights to ICANN, it is difficult to see how ICANN would be able to enforce these rights if ICANN ended its relationship with the USG as a project partner by walking away from the MoU/JPA—regardless of ICANN's success in removing references to the USG in these contracts and regardless of whether ICANN had fulfilled its obligations under the MoU/JPA.

#### **B. Step 2: Do the GAO's Preliminary Findings Raise any Questions Regarding the Continuity of ICANN Funding?**

The 1998 D.C. District Court case of *Thomas v. Network Solutions, Inc.*<sup>45</sup> should serve as a reminder of the authority that the U.S. judicial system continues to hold in Internet governance matters. The plaintiff obtained an injunction preventing either the National Science Foundation (NSF) or Network Solutions Inc. (NSI) from spending the portion of the domain name

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43. *Id.* at 4.

44. *Id.*; see also U.S. Const., Art. IV, § 3, cl. 2.

45. *Thomas v. Network Solutions, Inc.*, No. 97-02412 (D.D.C. Feb. 2, 1998) (*aff'd* by *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999)).

registration fees allocated to the Intellectual Infrastructure Fund (Fund).<sup>46</sup> The same District Court later ruled in favor of Plaintiff's motion for summary judgment that the fees collected as part of the Fund constituted a tax that was neither imposed nor ratified by Congress as required by Article I, Section 8 of the U.S. Constitution.<sup>47</sup>

In fact, this case was specifically referenced in the 2000 GAO report's discussion of ICANN's authority to impose fees to cover its costs as a "project partner" of the USG. If ICANN were to unilaterally choose not to enter into an extension of the JPA or some other typical of agreement to maintain its "project partner" status, third parties might challenge the collection and payment of fees to ICANN in the absence of such an agreement. Registration Authorities might have to evaluate whether to continue direct payments to ICANN or to instead place this money in escrow until an appropriate legal decision could be rendered.

If the GAO report were to identify, even preliminarily, any potential legal basis by which a third party could challenge the revenue flow of ICANN, it would be in the best interests of both ICANN and the NTIA either to extend the JPA or to enter into some other type of agreement to provide coverage for ICANN as a project partner per the terms of the 2000 GAO Report pending final resolution of the situation by Congressional action.

### **C. Congress Should Draft Legislation to Address any Specific Legal Issues Identified in the GAO Report, If Necessary**

While it is premature to propose specific remedies without the benefit of a new GAO report, the 2000 GAO Report did address some relevant issues that will need to be re-analyzed. For example, if the GAO concluded that TLDs themselves constitute property under the Ninth Circuit's test set forth in the *Kremen* (SEX.com) case, Congress would have to pass legislation authorizing the transfer of these "assets" to ICANN to avoid violating the Property Clause of the U.S. Constitution, which requires statutory authority for the disposal of government property. Even if there is a genuine issue of material fact regarding whether a TLD is property, Congress should act proactively to ensure the future security and stability of the Internet.

Should the GAO find that the TLD is, or could constitute, property, Congress would also have to act proactively and promptly by conveying all ccTLDs (both ASCII and IDN) to their respective governments. Failure of the USG to do so in a timely manner would likely cause a significant international incident. On the other hand, prompt Congressional action to formally convey these rights to other governments consistent with the principles set forth in WSIS and GAC documents would be a major positive step toward building a constructive relationship with these governments in the context of the larger Internet Governance discussion.

This legislation would also likely have to amend the IANA contract to ensure that each government had veto authority in connection with any proposed changes to that country's

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46. The domain name fee at this time was \$100 for a two year registration, with \$70 going toward NSI for the services provided in connection with the registration and maintenance of the domain name, and \$30 went into the Fund for future government use in connection with Internet projects.

47. See *Thomas v. Network Solutions, Inc.*, 2 F.Supp.2d 22, 38 (D.D.C.1998).

ccTLD within the A Root. By giving other governments peace of mind that no single government could unilaterally make changes within the A Root server to other countries' ccTLDs, Congress could proactively address serious international concerns that have even led to discussions regarding the establishment of an alternate authoritative root.

There are two other issues Congress should address in ICANN 3.0 legislation. First, Congress should ensure that the conveyance of these assets to ICANN is conditioned upon ICANN's continued adherence to the Principles set forth in the White Paper. While ICANN has promised that it will continue to observe these principles, legislation would provide the global Internet community, including U.S. business and individuals, a hardcoded mechanism to ensure fulfillment of this obligation.

Second, Congress should proactively address the possibility of ICANN's future failure for whatever reason. It should be hardcoded into the legislation that, in the event of ICANN failure, the "safety net" governance for each gTLD would be the government of the country in which that TLD operator is incorporated. Thus, for example, in the event of ICANN's failure, Verisign's .COM and .NET registry along with PIR's .ORG and NeuStar's .BIZ would fall under direct oversight of the USG, whereas .INFO and .MOBI would fall under the direct oversight of the Irish government. This ultimate fallback is the fairest way to address legitimate international concerns while also protecting U.S. interests as well as the overriding goal of preserving the "security and stability" of the Internet.

### Related PFF Publications

- [ICANN's Economic Reports: Finding the Missing Pieces to the Puzzle](#), Michael Palage, Progress Snapshot 5.4, June 2009.
- [ICANN's Implementation Recommendation Team for New gTLDs: Safeguards Needed](#), Michael Palage, Progress on Point 16.10, Mar. 25, 2009.
- [ICANN's "Go/ No-Go" Decision Concerning New gTLDs](#), by Michael Palage, Progress on Point 16.3, Feb. 17 2009.
- [ICANN's Game of Chicken with the USG & The Need for Adult \(GAO\) Supervision](#), by Michael Palage, PFF Blog, Dec. 22, 2008.
- [ICANN's gTLD Proposal Hits a Wall: Now What?](#), Michael Palage, PFF Blog, Dec. 22, 2008.

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The Progress & Freedom Foundation ■ 1444 Eye Street, NW ■ Suite 500 ■ Washington, DC 20005  
202-289-8928 ■ [mail@pff.org](mailto:mail@pff.org) ■ [www.pff.org](http://www.pff.org)