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# Legal Mechanisms for Governing the Transition of Key Domain Name Functions to the Global Multi-Stakeholder Community

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# **CHAPTER FOUR: LEGAL MECHANISMS FOR GOVERNING THE TRANSITION OF KEY DOMAIN NAME FUNCTIONS TO THE GLOBAL MULTI-STAKEHOLDER COMMUNITY**

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## ACRONYMS

ccTLD	country code top-level domain
DNS	Domain Name System
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation for Assigned Names and Numbers
ICDR	International Centre for Dispute Resolution
ICG	IANA Stewardship Transition Coordination Group
IRP Panel	Independent Review Process Panel
MoU	memorandum of understanding
NIC	Network Information Center
NTIA	National Telecommunications and Information Administration
TLD	top-level domain
USC	University of Southern California

## INTRODUCTION

This chapter examines the upcoming Internet Assigned Numbers Authority (IANA) transition, wherein the US government will relinquish its historic control over key technical functions making up the modern-day Internet. The chapter's most important questions are: if the Internet Corporation for Assigned Names and Numbers (ICANN), the current IANA functions operator, is no longer accountable to the US government, then who should it be accountable to? And what form should that accountability take?

The existing contractual arrangement between ICANN and the US government contains more than simple contractual terms. Rather, many of those contractual obligations actually make up the core tenets of contemporary multi-stakeholder governance, such as:

- ICANN cannot assign the IANA functions to someone else;
- ICANN must operate as a multi-stakeholder, private sector-led organization with input from the public;
- the need to ensure quality performance of the IANA functions; and
- the existence of important contractual requirements regarding the continuity of operations.

The fact is that the Internet has become too important and too global for any one state to exercise exclusive control — even historic control. Thus, the United States unilaterally giving up its historic contractual stewardship is laudable. There is a significant debate, however, about what structure should take its place — with one extreme arguing for a new international organization created by civil society, and the other extreme arguing for centralized state control under the auspices of the United Nations International Telecommunication Union.

This chapter does not engage in that debate. Rather, it seeks to advance a credible solution based on real-world facts, existing legal rules and prevailing political realities.

It advances a balanced option that could work based on existing constraints, including the rapidly approaching deadline for the transition and the more primary concern of maintaining the stability of the system during the transition period (and beyond). In advancing this option, this chapter argues that the existing core contractual requirements imposed by the US government could be migrated to the existing IANA functions customers. This would ensure that the core tenets of contemporary multi-stakeholder Internet governance are built into the DNA of the governance regime going forward. It may also go a long way to preserving (and even enhancing) the multi-stakeholder system itself. It would create one-to-one accountability between the organization delivering the IANA service and the customers of that service.

The chapter also advances modest internal accountability revisions that could be undertaken within ICANN's existing structure, in order to increase legitimacy within the broader Internet community and to enhance existing corporate governance. To that end, it argues that the independence of the Independent Review Tribunal, charged with taking an impartial, sober second assessment of certain ICANN board of directors-related decisions, could be increased by allowing the judges (arbitrators) that sit on the panel to be selected by a multi-stakeholder committee rather than being subject to approval by ICANN. Second, that the existing grounds of review could be expanded, allowing the tribunal — when warranted — to hear additional cases on a broader range of complaints. In this vein, this chapter adopts the conclusions from ICANN's own "Improving Institutional Confidence" process in 2008-2009. This process recommended that a new Independent Review Tribunal be established with powers to review the exercise of decision-making powers of the ICANN board under four general rubrics: fairness, fidelity to the power, cogency of decision making and addressing the public interest (ICANN 2009a).<sup>1</sup> This new tribunal could be drawn from a standing panel of internationally recognized relevant technical experts, as well as

<sup>1</sup> The public interest rubric is an added provision by the authors, and reflects general provisions in ICANN's bylaws.

internationally recognized jurists, including persons with senior appellate judge experience (*ibid.*). This chapter also argues that members of ICANN's various stakeholder groups and the public be able to make comments on the proposed bench before final appointment.

## BACKGROUND ON THE IANA TRANSITION

The US Department of Commerce's National Telecommunications and Information Administration (NTIA) has officially announced its intention to transition key Internet domain name functions to the global multi-stakeholder community (see NTIA 2014). In response, ICANN, the current IANA functions operator, is convening with various stakeholders to develop the transition plan. This consultative process has led to the formation of the IANA Stewardship Transition Coordination Group (ICG), which is comprised of 30 individuals representing 13 direct and indirect stakeholder communities. This group is charged with advancing a plan that would facilitate the transition of these key domain name functions. This transition would end the primary oversight role for the US government in the function and maintenance of the core technical functions implicated in the operation of the Internet.

The IANA functions are a set of different technical tasks that are foundational for the operation of the Internet, functions over which the US government currently maintains an oversight or stewardship role.<sup>2</sup> At their base, the IANA functions are a set of activities that offer a "coordination service for the upper-most level Internet identifiers. These functions work to ensure the secure, stable, and reliable allocation, assignment, and distribution of those identifiers, their uniqueness with respect to a well-defined identifier space, and the recording of to whom and/or for what purpose they are assigned" (ICANN 2014b, 6). One of these key stewardship functions is the oversight of changes to the authoritative root zone file (see IANA 2014).<sup>3</sup> The root zone file is the database that allows the Internet to function — acting as a global address book for data — containing an authoritative list of the names and Internet protocol addresses of all top-level domains.

<sup>2</sup> For an excellent summary on the history of the IANA functions and the role of the US government, see ICANN (2014b).

<sup>3</sup> According to IANA (2014), "[its] functions are a set of interdependent technical functions that enable the continued efficient operation of the Internet. The IANA functions include: (1) the coordination of the assignment of technical Internet protocol parameters; (2) the processing of change requests to the authoritative root zone file of the DNS [Domain Name System] and root key signing key...management; (3) the allocation of Internet numbering resources; and (4) other services related to the management of the ARPA and INT top-level domains [TLDs]."

Initially, the IANA functions were performed under a contract between an agency of the US government (the Defense Advanced Research Projects Agency) and the University of Southern California (USC), as part of a major research project. From the early 1970s, IANA assigned the Internet protocol address numbers, while the Network Information Center (NIC) at the Stanford Research Institute published them to the rest of the network. In 1990, this changed with the US Department of Defense awarding the NIC functions to Government Systems, Inc., which subcontracted it to the small private sector firm Network Solutions Inc. By 1992, with much of the Internet outside the US military, contracting authority for these publishing functions was accumulated under the US National Science Foundation, which awarded the NIC functions to Network Solutions Inc., and related directory and database services to AT&T. As this contract neared expiry in 1999, it became clear that the stable performance of the IANA and NIC functions were "vital to the stability and correct functioning of the Internet" (NTIA 2012, C.1.2). This led to the white paper process, which resulted in the formation of a multi-stakeholder organization, ICANN, to coordinate these functions. The initial contract to provide the services to perform the operation of the IANA was concluded between the US Department of Commerce and ICANN on February 8, 2000 (NTIA 2000). The publishing function was restructured under a Cooperative Research and Development Agreement between the US Department of Commerce and Verisign (which had bought Network Solutions Inc. in 2000). This contractual arrangement has continued, and it is the US government's willingness to relinquish its contractual authority over the IANA functions that provides the primary mechanism for ending its oversight role.

However, this announcement has led to the conflation of two different issues. The first is the actual technical administration of the IANA functions, which is not an issue at all. In fact, a 2013 IANA functions customer satisfaction survey indicated that there were extremely high satisfaction levels among customers for these services (Vegoda 2013). The second, and more nuanced, issue is that the US government's decision to relinquish its contractual authority over the IANA functions has exposed a broader question about ICANN's accountability. In its most basic form, the questions being asked are if ICANN is no longer accountable to the US government for the IANA functions through contract, then to which organization or community should ICANN be accountable and what form should that accountability take? This seemingly simple question has generated much confusion and political discussion.

It is worth making an important distinction here about the history of ICANN's accountability relations with the United States government since its inception. Initially, there were two established mechanisms of accountability. The first was the IANA procurement contract, which is

discussed later. The second was the memorandum of understanding (MoU) process by which the US Department of Commerce worked with the board and management of the new ICANN to ensure that it developed as was envisaged in the 1998 US white paper that had called for the establishment of a multi-stakeholder, not-for-profit entity to carry out the functions previously performed by US government agencies (ICANN 2000). In particular, the MoU process sought to ensure that ICANN “has the capability and resources to assume the important responsibilities related to the technical management of the DNS. To secure these assurances, the Parties... will jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to [ICANN]. Once testing is successfully completed, it is contemplated that management of the DNS will be transitioned to the mechanisms, methods, and procedures designed and developed in the DNS Project” (ICANN 1999). In practice, the development was undertaken by the ICANN community and embedded in its bylaws, procedures, organizational structure and policy development processes. ICANN submitted 13 reports to the US Department of Commerce until 2006, when the MoU process was amended to a final three-year Joint Project Agreement. In its conclusion, the US Department of Commerce formally recognized ICANN as the body envisaged in the white paper and the two parties made a detailed statement of responsibilities to the broader Internet community. This Affirmation of Commitments agreement replaced the US Department of Commerce with an international and multi-stakeholder mechanism from within the Internet community that outlined ICANN’s commitment to:

- ensure accountability, transparency and the interests of global Internet users;
- enhance the operational stability, reliability, resiliency, security and global interoperability of the DNS; and
- promote competition, consumer trust and consumer choice, especially in domain names, and commit to enforcing its existing policy relating to WHOIS, subject to applicable laws. (ICANN 2009b)

Despite the widely well-received Affirmation of Commitments,<sup>4</sup> at least part of the international Internet and political communities saw (and in many cases welcomed) the continuance of the IANA procurement contract as an added political patina: that the US government would continue as a critical political backstop against threats to Internet stability, and in this conception ICANN is — at least theoretically —

4 See <https://archive.icann.org/en/affirmation/affirmation-reaction.htm>.

accountable to the administration of the US government through the IANA contract.

Further confusion is created by the fact that some have failed to recognize the distinction between accountability for performing the IANA functions on the one hand, and accountability for broad policy decisions related to the DNS on the other; these are not the same thing. The Department of Commerce has made it clear that it sees the latter covered by the Affirmation of Commitments and ICANN’s other similar frameworks. With respect to accountability for the former, one possible approach could be that the relevant provisions that rendered ICANN accountable to the US government for the performance of these functions and the necessary service standards, could simply be migrated from the contracts with the Department of Commerce to the contracts between ICANN and its IANA services customers. In this regard, ICANN would then be accountable to its customers through the law of contract for the functions and services performed on its behalf.

A simple two-way equal accountability to the “customers” or “partners” of the IANA functions, however, does have its limitations. In certain circumstances, the exercise of the IANA functions requires an exercise of superior power. The three clearest examples are the recognition of a new TLD, the re-delegation of an existing TLD from one administrator to another and the recognition of a new regional Internet registry. While upward community policies have been developed through the ICANN multi-stakeholder processes, building on earlier Internet community documents, such as the Internet Engineering Task Force’s RFC 1591 (drafted by Jon Postel in 1994),<sup>5</sup> to establish the processes ICANN must follow to exercise this power,<sup>6</sup> circumstances require on occasions that the IANA function be exercised contrary to the narrow interests of an existing “partner.” The *cause célèbre* of this is a “hostile re-delegation” of a country code TLD (ccTD). The need for IANA to be able to act to implement the re-delegation process is recognized in various ways in the existing accountability agreements between ICANN and 84 ccTLDs.<sup>7</sup>

Consequently, this chapter proposes that, as well as accountability of performance of the IANA processes through the contracts or exchange of letters that ICANN has with its IANA services customers, there should also be a form of administrative review through appeal to the

5 Jon Postel originated the IANA function at USC and continued to perform the function until the task became too demanding, leading to the US government’s white paper process in 1998.

6 See [www.icann.org/resources/pages/background-2012-02-25-en](http://www.icann.org/resources/pages/background-2012-02-25-en); [www.icann.org/resources/pages/global-addressing-2012-02-25-en](http://www.icann.org/resources/pages/global-addressing-2012-02-25-en); [www.icann.org/resources/pages/new-rirs-criteria-2012-02-25-en](http://www.icann.org/resources/pages/new-rirs-criteria-2012-02-25-en); and [www.ietf.org/rfc/rfc1591.txt](http://www.ietf.org/rfc/rfc1591.txt).

7 See [www.icann.org/resources/pages/cctlds-2012-02-25-en](http://www.icann.org/resources/pages/cctlds-2012-02-25-en).

type of review panel proposed later in the chapter. This will allow parties affected by this exercise of “superior power” to have recourse to review the fidelity of the process followed by ICANN.

Accountability for policy decisions is *ab initio* more complex. Nevertheless, when engaging in discussions surrounding ICANN’s accountability in the broader sense, it is important not to lose sight of three critical facts. First, ICANN already has in place a number of internal and external mechanisms related to accountability for policy decisions. Second, at present, the US government has not, nor is likely to, intervene in the decision-making process within ICANN, making this portion of the existing accountability relationship largely symbolic.<sup>8</sup> Third, the US government made clear at ICANN’s Town Hall Meeting at the 2014 Internet Governance Forum that the discussion around enhancing ICANN’s accountability mechanisms should be narrowly focused on those related to the IANA functions. In this way, it now seems unequivocal that there is no open invitation to discuss major institutional change. Rather, when determining whether it will relinquish its contractual authority, the US government is interested only in narrowly articulated issues of accountability insofar as they relate to ICANN’s contractual relationship with the US government.

In addition to the constraint on the substantive elements of the accountability review, there are a number of other conditions that must be met in order for the transition plan to be accepted by the NTIA. The NTIA has indicated in no uncertain terms that to be accepted, the transition plan must:

- have broad community support;
- support and enhance the multi-stakeholder model;
- maintain the security, stability and resiliency of the Internet DNS;
- meet the needs of global customers for the IANA services;
- maintain the openness of the Internet; and
- not replace the NTIA role with a government-led or an intergovernmental organizational solution.

Currently, there is no consensus on an institutional framework that can meet these six necessary conditions. There is also no consensus on what the word

<sup>8</sup> According to Lawrence Strickling in a letter to Neelie Kroes titled “re: dot-xxx” on April 20, 2011: “While the Obama Administration does not support ICANN’s decision, we respect the multistakeholder Internet governance process and do not think that it is in the long-term best interest of the United States or the global Internet community for us unilaterally to reverse the decision” (Kruger 2014).

“accountability” actually means in this context, or on how ICANN’s broader accountability mechanisms could be strengthened in the absence of a contractual relationship with the US government.

To clear up the definitional ambiguity, this chapter employs a two-part definition of accountability. The first involves accountability for performance, meaning that the IANA functions are being performed promptly, efficiently and professionally. As a core piece of global critical infrastructure, one of the IANA accountabilities is that its processes and operations are effective 24/7/365. The second part adopts the definition put forward by Ruth W. Grant and Robert O. Keohane (2005) and assumes that accountability “functions to expose and sanction two sorts of abuses: the unauthorized or illegitimate exercise of power and decisions that are judged by accountability holders to be unwise or unjust.” Thus, in order to be accountable in the absence of the traditional contractual relationship with the US government, there must be some other mechanism that can function to ensure high performance standards and that can sanction unauthorized or illegitimate actions or inactions on the part of ICANN in its performance of the IANA functions.

## EXTERNAL ACCOUNTABILITY: CONTRACTUAL MIGRATION OF CORE REQUIREMENTS FOR IANA FUNCTIONS

### THE IANA FUNCTIONS CONTRACT

The IANA functions contract between the US Department of Commerce and ICANN includes a number of extremely important provisions, which are principled and sensible mechanisms, and which are now deeply engrained in the structure of contemporary Internet governance. However, the absence of a contractual obligation to the US government for these provisions could undermine their legal footing.

As an example, the IANA functions contract creates important obligations regarding how ICANN relates to affected parties. Under the existing contract, ICANN is obliged to develop a close constructive working relationship with all interested and affected parties to ensure quality and satisfactory performance of the IANA functions (NTIA 2012, C.1.3). ICANN is also prohibited from subcontracting or assigning the required services to another entity (*ibid.*, C.2.1).

With respect to the establishment and collection of fees from the IANA functions customers, there is a contractual requirement to ensure that the fee levels are fair and reasonable, and that any proposed fee structure would be based on the cost of providing the specific service in question (*ibid.*, C.2.3). There is also a requirement to treat

each of the IANA functions with equal priority, and process all requests promptly and efficiently (C.2.4).

More generally, there are requirements to develop and implement performance standards (C.2.8), to process root zone file changes as expeditiously as possible (C.2.9.2.a) and to create a process for IANA functions customers to submit complaints for the timely resolution of disputes (C.2.9.2.g). The contract also creates security requirements (C.3), establishes a need for performance measures and metrics, creates a requirement to avoid conflicts of interest (C.6) and produces a robust set of requirements regarding continuity of operations (C.7).

## THE AFFIRMATION OF COMMITMENTS

In the event of the US government relinquishing its IANA contract, any inferred enforcement mechanism for ICANN compliance with the Affirmation of Commitments will cease. The Affirmation is a contract that creates both rights and obligations for ICANN. The unilateral decision of the US government to remove itself from one of the central positions in Internet governance has also created an uncertain basis for the Affirmation. This is problematic because it contains some of the core tenets of contemporary Internet governance. This document includes a commitment to ensure that decisions made that are related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent. The Affirmation also requires ICANN to: preserve the security, stability and resiliency of the DNS; promote competition, consumer trust and consumer choice in the DNS marketplace; and facilitate international participation in DNS technical coordination (ICANN 2009b).

These are incredibly powerful commitments, which echo some of the key tenets of Internet governance. The Affirmation also requires ICANN to “ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders” (ibid., paragraph 4). In order to achieve this, ICANN is required to perform and publish analyses of the “positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS” (ibid.). Pursuant to the Affirmation, ICANN also commits to:

- adhere to transparent and accountable budgeting processes;
- fact-based policy development and cross-community deliberations;
- responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy considerations;

- publish each year an annual report that sets out ICANN’s progress against ICANN’s bylaws, responsibilities, and strategic and operating plans;
- provide a thorough and reasoned explanation of decisions taken, the rationale thereof, and the sources of data and information on which ICANN relied; and
- operate as a multi-stakeholder, private sector-led organization with input from the public, for whose benefit ICANN shall in all events act. (ibid.)

In reviewing the commitments undertaken in the Affirmation, it is clear that they are more than basic contractual functions. Rather, they are parts of the core fabric of the current model of governance, as seen with the examples of the commitment to operate as a multi-stakeholder institution with input from the public and the requirement to act in the public’s interest. With the absence of a contractual obligation to the US government for these foundational principles, the transition plan should seek to incorporate external mechanisms for preserving them. One credible way of doing this is to migrate the contractual obligations now found in the IANA services contract and the Affirmation into contracts with the IANA functions customers. Another is to bolster the existing legal responsibility of the ICANN board to operate according to its mission and core values (which include many of the Affirmation of Commitments details).<sup>9</sup> Such bolstering could come

<sup>9</sup> ICANN’s existing legal framework establishes some administrative law requirements: first, under the California Corporations Code provisions for not-for-profit, public benefit corporations; and second, under common law. ICANN’s directors are required under the California Code to implement the purposes outlined in its Articles of Incorporation: “of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)...The Corporation 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, the Corporation shall cooperate as appropriate with relevant international organizations” (ICANN 1998).

The board members are accountable to these purposes, and the California Code empowers the Attorney General of California to intervene in the organization if they are breached. Further, a director of a non-profit public benefit corporation owes, under common law, a duty of care to the entity. It is required that the director take reasonable measures to ensure that the organization is managed and directed in a manner that is consistent with its mission. For details of how this imposes public interest duties on the directors, see [www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf](http://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf).

through the augmented adoption of a proposal put forward by ICANN’s Improving Institutional Confidence process in 2008-2009: the establishment of a new Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN board under four general rubrics — fairness, fidelity to the power, cogency of decision making and addressing the public interest (ICANN 2009a).

## MIGRATING THE CORE CONTRACTUAL REQUIREMENTS

Given the foundational nature of the core commitments found within both the Affirmation and the IANA functions contract, any regime adopted to facilitate the transition should seek to enshrine them in the future governance structure. These requirements should be enumerated in a way that renders ICANN externally accountable for performance standards and exposed to sanction for abuses or for behaving in a manner that runs contrary to these commitments. In order to achieve this going forward, the core commitments found within both the Affirmation and the IANA functions contract could be migrated through the law of contract into individualized service agreements with IANA services customers. As a procedural matter, it would also be permissible to migrate these foundational principles into a collective services agreement between ICANN and all IANA services customers, leaving the individualized contracts to address matters unique to ICANN and the individual customer in question.

On the most important tenets, it may even be advisable to draft a clause favouring specific performance as a remedy. Specific performance is a remedy that allows a court to require a party to perform a particular act, as an alternative to monetary damages. This would create a hard external accountability check, with a meaningful remedy provision, held directly by those organizations most affected by a particular decision, action or inaction.

## INTERNAL ACCOUNTABILITY: FURTHER SUPPORTING ICANN’S EXISTING STRUCTURE

ICANN is organized as a non-profit public benefit corporation under the California Nonprofit Public Benefit Corporations law. Under this framework, ICANN (1998, paragraph 4) is designed to operate “for the benefit of the Internet community as a whole” according to its Articles of Incorporation. Articles of Incorporation are considered to be the constitutional documents of any corporate structure and it is impermissible for either management of the corporation or the directors to behave in a manner that runs counter to the articles or the purposes articulated in that document. In this respect, at least some of the foundational governance principles found in the Affirmation are already part of the ICANN corporate

structure. There are, however, several limited internal governance revisions, which could further increase accountability, while not adding an additional onerous administrative burden.

The existing governance structure of ICANN includes a number of mechanisms to ensure accountability within its operations.<sup>10</sup> However, this chapter only examines the process for reconsideration and internal review of decisions of the ICANN board of directors, and the external and independent review of board decisions.

## ACCOUNTABILITY AND REVIEW

Pursuant to the bylaws, there is a mechanism under which a party aggrieved by a decision of ICANN staff or the board may request reconsideration or review of that decision. To that end, the bylaws provide that any person may submit a request for reconsideration or review, if they have been adversely affected by:

- “a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
- b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
- c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.” (ICANN 2014a, Article IV, section 2, paragraph 2)

The Board Governance Committee reviews and considers these reconsideration requests. For all reconsideration requests involving staff, the Board Governance Committee has delegated authority to make a final determination. In practice, the Board Governance Committee makes a recommendation to the board, including a resolution, which the board typically adopts. With respect to board decisions, the bylaws provide that the “Board shall not be bound to follow the recommendations of the Board Governance Committee....The Board’s decision on the recommendation is final” (ibid., paragraph 17). This is a reflection of Californian and US federal law, which stress that boards cannot delegate away their final accountability. In this way, reconsideration is permissible if information

<sup>10</sup> There are a number of mechanisms that would fit under the broad heading of accountability that will not be considered here. These include, but are not limited to, bylaw requirements for transparency, information disclosure and financial accountability, including external audits.



was lacking at the time the impugned decision was made, or the decision runs contrary to established policy.

This provision could be strengthened by adding an additional substantive ground of reconsideration — allowing a reconsideration request to go forward if an aggrieved party alleges that a decision was undertaken in a manner that runs contrary to the public interest. Adding a public interest ground for reconsideration requests would add an additional level of assurance that decisions are being undertaken in a manner that adequately considers the implications of those decisions on the interests of the broader public. This will inevitably require weighing various interests, which may at times be conflicting. Nevertheless, if an aggrieved party can allege a prima facie breach of the public interest (recognizing that a working definition of “public interest” will need to be articulated), then a substantive ground of reconsideration on this basis would strengthen the existing governance structure.

## INDEPENDENT REVIEW OF BOARD ACTIONS

There is also a separate process for independent third-party review of board actions that are alleged to be inconsistent with the Articles of Incorporation or bylaws. In these cases, an Independent Review Process Panel (IRP Panel) will be established. Pursuant to the bylaws, the IRP Panel must apply a defined standard of review, focusing on the following:

- “a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?” (ibid., section 3, paragraph 4)

As a starting point, in order to strengthen the existing governance structure, the standard of review should be broadened. The current narrowly defined standard will allow review only in the event of a decision made based on a conflict of interest, a lack of diligence or lack of independence. In order to assuage some of the community’s concerns regarding accountability, just like with the reconsideration of decisions noted above, the standard could be broadened to specifically incorporate independent review on the grounds that a decision was taken in a manner that runs contrary to the public interest. This is already being done in a somewhat roundabout way. The board is obliged to undertake decisions that they believe to be in the best interest of the company, which

are in turn based on a corporate fiduciary duty,<sup>11</sup> and those decisions must be in accordance with the Articles of Incorporation. The Articles of ICANN specifically articulate a need for operations that benefit the Internet community as a whole. Thus, there is already a mechanism through which at least a portion of the public interest would be considered, though the Internet community is a narrower subset of the public — which would include individuals who have yet to use the Internet. However, specifically incorporating a ground of review based on overall public interest would also serve to reinforce the existing review structure and buttress existing accountability mechanisms. The existing grounds of review could be further expanded along the lines articulated in the Improving Institutional Confidence to include review on the grounds of fairness, fidelity and rationality. Grounds of fairness would allow review surrounding the integrity of the decision-making process. A fidelity review would ensure that decisions were undertaken in a manner that was faithful to the “scope and objects of the power being exercised.”<sup>12</sup> A rationality review would independently confirm or deny that decisions were made in a cogent way, taking account of relevant evidence and within the scope of authority. This would also be an important step in implementing the NETmundial outcome document, which specifically recognizes that “the Internet is a global resource which *should be managed in the public interest*” (NETmundial 2014, emphasis added). Setting out a ground of review that recognizes this could garner a good amount of community support.

On the procedural side, when an independent review proceeding is brought, it is administered by an international dispute resolution provider, which is appointed by ICANN. In 2006, ICANN appointed the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration

11 Directors are subject to certain fiduciary duties in carrying out their governance responsibilities. One such obligation is often referred to as the “duty of loyalty,” which places two separate legal requirements on directors. The first is that the director act in good faith when conducting the business of the corporation. The second is that the director continually act in the best interests of the corporation, placing the interests of the corporation above the interests of all others — including their own — when making decisions. See *ICM Registry, LLC, Claimant, v. Internet Corporation for Assigned Names and Numbers (“ICANN”)*, Respondent, Declaration of the Independent Review Panel, February 19, 2010, Concurring and Dissenting Opinion of Judge Dickran Tevrizian, at 74 (“Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See *Raven’s Cove Townhomes, Inc. v. Knuppe Dev. Co.*, (1981) 114 CA3d 783, 799; *Burt v. Irvine Co.*, (1965) 237 CA2d 828, 852. See also, *Harvey v. Landing Homeowners Assn.*, (2008) 162 CA4th 809, 821-822.”). See also ICANN’s (2014a) Article VI, Board of Directors, Section 7, Duties of Directors: “Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.”

12 See <https://archive.icann.org/en/jpa/iic/iic-the-way-forward-31-may09-en.pdf>.

Association, as the provider. The provider coordinates the membership of the standing panel, subject to ICANN approval. The ICDR's rules give each party the right to propose an arbitrator, with the third panellist selected by the ICDR. The procedural rules for the settlement of disputes are also subject to the approval of the ICANN board. These arbitrations are also non-binding,<sup>13</sup> although the board has stated its intent to implement decisions of these sorts of arbitrations.

The most problematic element is a lack of independence between ICANN and the individuals appointed to hear a dispute involving a decision taken by the board of that organization. Section 3, paragraph 7 of ICANN's bylaws states that all IRP Panel proceedings be administered by an international dispute resolution provider appointed by ICANN (the IRP Panel provider). The membership of the standing panel shall be coordinated by the provider, subject to approval by ICANN (ICANN 2014). The difficulty created by this potential lack of independence is that the members of the arbitral panel could be beholden to ICANN for their position on the panel. Realistically, it is unlikely that an individual arbitrator would side with ICANN in a dispute based on the fact that ICANN approved their appointment to the standing roster of arbitrators. Nevertheless, this process of confirming appointments does raise the reasonable *apprehension* of a lack of independence. In order to remedy this perceived lack of independence, a standing committee comprised of various stakeholder groups could be struck to oversee the provider's populating of the list of eligible arbitrators.

More substantially, the IRP Panel process could be replaced by the Independent Review Tribunal recommended by ICANN's Improving Institutional Confidence process. That process proposed that "the International Dispute Resolution Provider name a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. The existence of a known and recognized 'bench' of 'judges' will add to the stature and authority of the Independent Review Panel. The panel's members should be appointed for either a set period of five years or until they resign, whichever is the earlier" (ICANN 2009a). This chapter proposes that the members of ICANN's various stakeholder groups and the broader public be able to make comments on the proposed bench before final appointment.

## CONCLUSION

There are two major constraints on the implementation of any proposed mechanism that can meet the enumerated criteria set for any transition proposal. The first is time.

<sup>13</sup> See *ICM Registry, LLC, Claimant, v. Internet Corporation for Assigned Names and Numbers ("ICANN"), Respondent, Declaration of the Independent Review Panel*, February 19, 2010.

The IANA functions contract expires in September 2015. The announcement that the US government was prepared to relinquish its contractual authority was made in March 2014. Based on this, the ICG has established a process timeline for the generation of the transition proposal.

Under this process timeline, the first stage involves affected communities developing their proposal text and submitting that material to the ICG. The current deadline for the submission of these materials is January 15, 2015, leaving approximately nine months before the contract expiry (or option commencement)<sup>14</sup> period. This would leave approximately nine months to review the various proposals put forward by the community, synthesize a draft response, receive and respond to feedback on the draft proposal, ensure that the proposed system will actually work, and then allow adequate time for the NTIA to review and respond to the proposed structure.

The second constraint is scope. In addition to the necessary conditions imposed on the transition proposal, any proposed structure must also carry domestic political support within the United States. The former Speaker of the US House of Representatives Tip O'Neill once said, "All politics is local." The case of the IANA functions transition is no different. Creating a system where the various accountability mechanisms previously held by the US government are held by the customers of the IANA services could be the type of private sector response that may carry domestic political support. Moreover, this form of modest and measured approach may also be practicable within the incredibly tight timelines associated with the transition.

Engaging in the moderate redesign set out in this chapter does not preclude the grand institutional bargain and redesign that some favour at a future point. Many states and groups within civil society are seeking a broad reimagining of the way that the Internet is governed, with some even calling existing structures illegitimate. Whether these concerns are warranted or not, the fact is that undertaking a measured approach now to the IANA transition would not necessarily prevent or impede a larger negotiation about institutional design and legitimacy. However, this could be done in a staged manner, addressing issues of immediate concern — such as the September 2015 deadline — with the larger and more contentious issues left for resolution without being imbued with a false sense of urgency.

Considering these constraints, this chapter recommends the following steps to help improve the accountability of the performance of the IANA functions by ICANN:

<sup>14</sup> Pursuant to the IANA functions contract, the base period of performance of this contract is from October 1, 2012 through September 30, 2015. However, there are two option periods, which — if exercised — would extend the period of performance to September 30, 2019.

- That the relevant provisions that rendered ICANN accountable to the US government for the performance of the IANA functions and the necessary service standards be migrated from the contracts with the Department of Commerce to the contracts between ICANN and its IANA services customers. In this regard, ICANN would be accountable to its customers through the law of contract for the functions and services performed on their behalf. It would be advisable to include a clause favouring specific performance as a remedy.
- That a new Independent Review Tribunal be established in accordance with a proposal of ICANN's Improving Institutional Confidence process.
- That the tribunal be comprised of a standing panel of relevant technical experts and jurists, including those with senior appellate judge experience, appointed for either a set period of five years or until they resign, whichever is the earlier. We propose that the members of ICANN's various stakeholder groups and the public be able to make comments on the proposed bench before final appointment.
- That if ICANN also continues with its existing independent review process, a standing committee comprised of various stakeholder groups could be struck to oversee the provider's populating of the list of eligible arbitrators. This should counter the reasonable apprehension of a lack of independence in the present model for selection of arbitrators.

The proposed solution is not a panacea. Rather, it is put forward as a principled solution that could work within the existing constraints. However, there are a number of issues that will require detailed consideration in the event that a proposal along the lines articulated is considered for implementation. One concern is the issue of the re-delegation. In the event that accountability measures vest through the law of contract in the IANA functions customers, careful consideration will need to be given to the prospect of re-delegation by those customers. It will be important to ensure clarity and transparency around the cases of re-delegation, and to allow parties who are affected by this exercise of "superior power" to have recourse to administrative review through the proposed Independent Review Tribunal.

The transition creates an important opportunity for the multi-stakeholder approach to Internet governance. A private solution ordered through contract law could create an important independent accountability check in the absence of the historical role played by the US government. At the same time, further refinements to the Independent Review Tribunal, including more robust grounds of review in line with administrative law, could refine and enhance with existing governance regime.

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