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International Affairs

# Global Commission on Internet Governance

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## **ICANN: Bridging the Trust Gap**

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Emily Taylor





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## ABOUT THE GLOBAL COMMISSION ON INTERNET GOVERNANCE

The Global Commission on Internet Governance was established in January 2014 to articulate and advance a strategic vision for the future of Internet governance. The two-year project conducts and supports independent research on Internet-related dimensions of global public policy, culminating in an official commission report that will articulate concrete policy recommendations for the future of Internet governance. These recommendations will address concerns about the stability, interoperability, security and resilience of the Internet ecosystem.

Launched by two independent global think tanks, the Centre for International Governance Innovation (CIGI) and Chatham House, the Global Commission on Internet Governance will help educate the wider public on the most effective ways to promote Internet access, while simultaneously championing the principles of freedom of expression and the free flow of ideas over the Internet.

The Global Commission on Internet Governance will focus on four key themes:

- enhancing governance legitimacy — including regulatory approaches and standards;
- stimulating economic innovation and growth — including critical Internet resources, infrastructure and competition policy;
- ensuring human rights online — including establishing the principle of technological neutrality for human rights, privacy and free expression; and
- avoiding systemic risk — including establishing norms regarding state conduct, cybercrime cooperation and non-proliferation, confidence-building measures and disarmament issues.

The goal of the Global Commission on Internet Governance is two-fold. First, it will encourage globally inclusive public discussions on the future of Internet governance. Second, through its comprehensive policy-oriented report, and the subsequent promotion of this final report, the Global Commission on Internet Governance will communicate its findings with senior stakeholders at key Internet governance events.

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## ABOUT THE AUTHOR

Emily Taylor is an Internet governance expert and an associate fellow of Chatham House. She is a member of the Global Commission on Internet Governance Research Advisory Network. Her research publications include the annual EURid UNESCO *World Report on Internationalised Domain Names* (lead author), reports for the UK regulator, Ofcom, on uptake of domain name security protocol, IPv6 and Carrier Grade Network Address Translation, and a review of the Internet Corporation for Assigned Names and Numbers (ICANN's) policy development process. She chaired the independent WHOIS Review Team for ICANN, and served on the Internet Governance Forum's Multi-stakeholder Advisory Group. From 2000–2009, she was at Nominet as director of Legal and Policy, and she is now a director of several IT companies.

## ACRONYMS

ATRT	Accountability and Transparency Review Team
ATRT2	Accountability and Transparency Review Team (second review)
DNS	domain name system
GAC	Governmental Advisory Committee
GNSO PDP	Generic Names Supporting Organization Policy Development Process
gTLD	generic top-level domain
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation for Assigned Names and Numbers

## EXECUTIVE SUMMARY

This paper addresses the proposed transfer of Internet Assigned Numbers Authority (IANA) oversight away from the US government. The background section explores how the technical architecture of critical Internet resources has certain governance implications, introduces the Internet Corporation for Assigned Names and Numbers (ICANN) and its relationship with the US government through the IANA function and the Affirmation of Commitments. After discussing why the relationship has caused controversy, the paper describes the work underway within ICANN to find a successor oversight mechanism and provides a short critique of the proposals so far. The majority of the paper is taken up with more general issues relating to ICANN's accountability. It explains how the IANA transition was recognized to be dependent on ICANN's wider accountability, and the trust issues between community and leadership that this exposed. There follows an analysis of ICANN's strengths and weaknesses in relation to accountability and transparency, followed by conclusions and recommendations.

## INTRODUCTION

A limited set of unique identifiers is the lightweight glue that holds together a single, global Internet. Management of these strategic resources was spun out by the US government to a private sector body, ICANN, in the late 1990s. The US government's vestigial oversight of ICANN has long caused controversy in Internet governance discussions. In 2014, the United States announced intent to relinquish that oversight, provided a suitable multi-stakeholder mechanism could be found to replace it. The ICANN community has risen to the challenge with energy and commitment, and has already identified principles for transition and a proposed mechanism. Meanwhile, ICANN has been persuaded to make IANA transition dependent on improvements to ICANN's general accountability. ICANN's leadership initially resisted that dependency, and it took unprecedented joint representations by community leaders to persuade it. At the same time, this revealed an

interesting trust deficit between the ICANN community on the one hand and ICANN, the corporation, on the other.

After setting out the history of ICANN's formation and more recent developments following the US announcement, this paper explores issues surrounding ICANN's accountability in order to assist the task of strengthening trust between the two communities.

ICANN has many strengths, including very high levels of transparency in policy-making processes. Systematic, regular review mechanisms, which contribute to creating a learning organization, even if implementation of review recommendations is uneven. In recent years, progress has been made in strengthening the effectiveness of ICANN's board of directors and beginning to internationalize participation.

Given ICANN's function and structure as a policy-making body, with diverse stakeholders representing differing (sometimes conflicting) interests, a degree of mistrust among the participants is inevitable, even healthy. But there are non-inevitable tensions, arising from ICANN's unusual structure. The lack of membership causes potential conflicts:

- between directors' fiduciary duties to the corporation on the one hand, and the public interest on the other; and
- for elected directors, between their fiduciary duties to the corporation and the expectation by the electing community that the director will represent and fight for their interests rather than for the good of the corporation or the public interest.<sup>1</sup>

The lack of membership also creates a cul-de-sac of authority, where the board is left to review its own decisions, and has no external mechanism to recall individual directors. With low levels of trust and high expectations of transparency, there is a risk of perverse consequences and destructive patterns of behaviour between staff and community. Meanwhile, the public interest is further undermined by not having a ready way for governments and end-users to provide timely input as an integral part of ICANN's formal policy-making processes — the Generic Names Supporting Organization Policy Development Process (GNSO PDP). Strengthening the effectiveness of financial oversight is essential as revenues increase and, with them, a pressure for scope creep.

The paper concludes that the ICANN community is likely to reach a satisfactory outcome. However, this will not be easy or quick. Recommendations are offered in order to assist the community's deliberations, it is suggested

<sup>1</sup> ICANN's Bylaws, Article VI, Section 7 are clear this is not the case, but it remains a potential conflict. See [www.icann.org/resources/pages/governance/bylaws-en#VI](http://www.icann.org/resources/pages/governance/bylaws-en#VI).

that ICANN bridge the trust gap with the community by institutionalizing mistrust through implementing multiple checks and balances. The introduction of a membership would provide a mechanism to approve changes to ICANN's constitution, and to recall individual directors. Financial oversight should be strengthened.

## BACKGROUND: IANA, THE STORY SO FAR

To understand the situation ICANN currently finds itself in, it is necessary to review its history. Over the past 17 years, ICANN has grown in size and financial strength; as a corollary, the global community has become ever more reliant on the smooth functioning of a single Internet.

When ICANN was founded in 1998, there were approximately 100 million global Internet users (Gromov 2014). By 2014, there were nearly three billion (International Telecommunication Union 2014).<sup>2</sup> Then, there was a handful of generic top-level domains (gTLDs); now there are more than 400, with another 500 due to launch in 2015.

## THE GOVERNANCE IMPLICATIONS OF UNIQUE RESOURCES AND HIERARCHICAL ARCHITECTURE

The Internet is a distributed system, but its smooth functioning requires naming and numbering to be unique and universally resolvable. The need for uniqueness means that these resources are curated by single organizations, operating within a strict hierarchy (DeNardis 2014). Rationally, that hierarchy must have a top-most node, from which all the downstream authority flows. In the case of critical Internet resources, that top-most node is the IANA.

The strategic importance of the IANA persists, despite rampant change in the wider Internet technologies. Despite the growth of search, apps and a handful of popular Web services in the years since ICANN was founded, the domain name system (DNS) continues to play an integral role in holding together a single Internet: in Web browsing, email, certificates and/or user identifiers for online accounts. The pervasive nature of the DNS is illustrated in the struggle to create universal acceptance of internationalized domain names over the past 15 years (EURid 2014).

## ICANN AND THE IANA

ICANN was founded in 1998 by the US government. It is a private, not-for-profit corporation with no members, incorporated under the laws of California. Funded by

the domain name industry,<sup>3</sup> ICANN's role includes coordination of critical Internet resources, the DNS and Internet Protocol addressing and the protocol parameters registry. Apart from its policy-making dimension for gTLDs, ICANN is also responsible for managing and updating the domain name root zone — the so-called IANA function.

The management of the IANA is split between ICANN, which coordinates the policy and administrative aspects, and Verisign, which manages the actual database under separate contract with the US government.

ICANN has always had a contractual or quasi-contractual relationship with the US government, but the US government envisioned from the outset that it would relinquish its role as backstop authority once the ICANN model "was established and stable" (US Department of Commerce 1998, paragraph 4).

ICANN's relationship with the US government is based on two instruments:

- **The Affirmation of Commitments**, 2009, between the US Department of Commerce and ICANN (ICANN 2009). At the core of the Affirmation of Commitments is a requirement that ICANN undertake regular reviews into aspects of its operations and governance.<sup>4</sup> The Affirmation of Commitments is the third iteration of the relationship between the United States and ICANN, and the lightest-touch instrument so far. It can be terminated on 120 days' notice by either party.
- **The IANA contract** was most recently awarded in 2012 and expires in September 2015 (renewable for a further four-year period thereafter). The contracting parties are the US Department of Commerce and

3 See, for example, the .com Registry Agreement between ICANN and Verisign, Inc. at [www.icann.org/resources/pages/agreement-2012-12-05-en](http://www.icann.org/resources/pages/agreement-2012-12-05-en). According to Section 7.2, ICANN is entitled to \$0.25 on each .com registration and renewal. New gTLDs allow for a similar percentage as well as a fixed registry fee of \$25,000 per year (according to the base registry agreement; see <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-20nov13-en.pdf>). At the same time, ICANN levies \$0.18 from registrars for each domain name registration and renewal, see page 86 of the *FY15 ICANN Operating Plan and Budget* at [www.icann.org/en/system/files/files/adopted-opplan-budget-fy15-01dec14-en.pdf](http://www.icann.org/en/system/files/files/adopted-opplan-budget-fy15-01dec14-en.pdf). All currency in this paper is in US dollars.

4 These reviews are: accountability and transparency (Section 9.1); security and stability (9.2); competition and consumer choice (9.3); and WHOIS (9.3.1). So far, two accountability and transparency reviews have taken place, and one each on WHOIS and security and stability. Competition and consumer trust review is due to take place "if and when new gTLDs...have been in operation for one year." In late 2014, an independent advisory group published suggested metrics for the Competition, Consumer Trust and Choice Metrics Review Team, but at this time it is not clear whether a review team has been formed.

2 See also <http://news.bbc.co.uk/1/hi/technology/8552410.stm> for an animated visualization of growth of Internet users from 1998 to 2008.

ICANN, for a consideration of \$1. The contract covers the operation of the IANA database.<sup>5</sup>

## THE US GOVERNMENT'S AUTHORITY OVER IANA: A CONTROVERSIAL HISTORY

Through the IANA contract, the US government has ultimate authority over the IANA, and hence over the Internet's entire navigation system. This has long been a focus of a power struggle within Internet governance discussions. The issue dominated discussions during the 2003–2005 World Summit on the Information Society,<sup>6</sup> as reflected in the Tunis Agenda,<sup>7</sup> the World Conference on International Telecommunications in Mexico in 2014<sup>8</sup> and the NETmundial meeting in Brazil in 2014 (NETmundial 2014).

The symbolism of having a single government in control of one of the Internet's few choke points has obscured the fact that the IANA works well. There has been no credible challenge to the United States' assertion that it has never interfered in updates to the root zone.

The US government has exercised restraint in its oversight of the IANA and "has generally established a prudent policy of non-intervention in the DNS operation" (Demidov 2014). It published an overview of its role in authorizing changes to the IANA database (National Telecommunications and Information Administration 2014b), demonstrating that its primary role is administrative.

It may come as a surprise that while US government oversight of the IANA has been identified as problematic by many governments and other stakeholders for more than a decade, there have been few efforts to identify an acceptable replacement.

5 See [www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf) for the contract.

6 During the World Summit on the Information Society process, the US government announced that it did not intend to transition the IANA function: "the United States...will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file....The United States will continue to provide oversight so that ICANN maintains its focus and meets its core technical mission." See [www.ntia.doc.gov/other-publication/2005/us-principles-internets-domain-name-and-addressing-system](http://www.ntia.doc.gov/other-publication/2005/us-principles-internets-domain-name-and-addressing-system).

7 See [www.itu.int/wsis/docs2/tunis/off/6rev1.html](http://www.itu.int/wsis/docs2/tunis/off/6rev1.html) (paragraphs 35, 58, 63–65, 68–71 ["enhanced cooperation"]).

8 See [www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf](http://www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf). While 89 states signed the updated International Telecommunications Regulations, more than 50 did not. It was the inclusion of references to spam, private network operators and network security that prompted some governments to refuse to sign. See also the remarks of US Ambassador Terry Kramer to the Washington, DC chapter of the Internet Society, December 19, 2012, [www.youtube.com/watch?v=cN\\_PwWkv14A](http://www.youtube.com/watch?v=cN_PwWkv14A).

## IANA TRANSITION

In March 2014, shortly before the NETmundial meeting in Brazil, the US government unexpectedly announced "its intent to transition key Internet domain name functions to the global multistakeholder community" as early as September 30, 2015 (National Telecommunications and Information Administration 2014a). The announcement asked ICANN to develop a transition proposal that satisfies four principles:

- support and enhance the multi-stakeholder model;
- maintain the security, stability and resiliency of the Internet DNS;
- meet the needs and expectation of the global customers and partners of the IANA services; and
- maintain the openness of the Internet.

The United States has chosen not to define a successor model. According to Lawrence E. Strickling, assistant secretary of commerce for communications and information, "I think it's a real test to the community of the multistakeholder model and can they organize themselves? Can they now focus on the important issues and get to consensus? I think upon the successful completion of this, and I do expect a successful completion, this process will be much stronger for what the community is going through right now as they try to wrestle with all of the different issues...on what is perhaps the most fundamental question ICANN has had to face since its creation back in 1998" (Strickling 2014b).

The NETmundial meeting in April 2014 showed that multi-stakeholder processes can deliver timely consensus outcomes, and this has raised confidence levels in the likelihood of a successful resolution.

## ONE GOVERNMENT, ALL GOVERNMENTS OR MULTI-STAKEHOLDER GOVERNANCE?

Some critics of the US government's role in relation to the IANA have long advocated a transition to an intergovernmental model, in other words replacing a single government with all governments (India-Brazil-South Africa 2011). This has a certain logic, stemming from the inherent legitimacy of sovereign governments to oversee global resources and protect the public interest. But critics point to risks of politicization of an essentially technical function, or characterize calls for UN involvement either as a covert attempt to clamp down on Internet freedom, or a counter-revolutionary attempt by telecommunication companies to turn back the clock of the Internet and retrieve vanishing revenues and influence (Denton 2015).

What's the alternative? Over the past decade, multi-stakeholder governance has emerged as an alternative

model for the Internet, associated with delivering innovation, openness and growth (although correlation doesn't necessarily prove causation). The complexity of the Internet, both in structure and issues, has led to the conclusion that "Internet governance should be built on democratic multistakeholder processes, ensuring the meaningful and accountable participation of all stakeholders" (NETmundial 2014). The Organisation for Economic Co-operation and Development and others (see US Congress 2012a; 2012b) have also advocated multi-stakeholder governance for the Internet.

In its ideal form, the multi-stakeholder system limits the power of governments and of corporates — an ever more powerful force within the ICANN environment. It also brings in the voice of users through civil society participation. Technical stakeholders ideally keep policy discussions anchored to operational reality. The legitimacy of multi-stakeholder governance stems from openness of process and the expertise of participants.

There are also known weaknesses in multi-stakeholder governance. Legitimacy can be weak, costs of participation are high, developed countries and industry tend to dominate, processes are slow and rambling, and overall participation is low. Having open processes does not guarantee equitable participation, and there are few effective mechanisms to prevent capture by special interest groups.

The US government announcement stated that it "will not accept a transition proposal that replaces the National Telecommunications and Information Administration role with a government-led or an intergovernmental organization solution."<sup>9</sup> The fact that the United States felt the need to include this caveat indicates that a multi-stakeholder solution was not deemed inevitable.

Likewise, a solution that leaves the US government in ultimate control would be unacceptable to many, as would a solution that cuts ICANN loose from any direct accountability (Carnegy 2014). The Centre for Democracy & Technology summarized the concerns: "The prospect of an unaccountable ICANN, or one subject to control by governments or special interests, has enormous implications for the open, innovative, global Internet" (Shears 2014).

## SEPTEMBER 2015: DEADLINE OR TARGET?

Despite intense efforts and engagement by many in the ICANN community to define a way forward by the summer of 2015, the difficulty of untangling the issues, and of reconciling the diverse, legitimate interests, make it likely that the process will take longer. Lawrence E. Strickling

(2014a) has already prepared the ground, signalling an intent to renew the IANA contract: "We have repeatedly noted that we can extend the contract for up to four years if the Internet community needs more time to develop a proposal that meets the criteria we have outlined. In the meantime, our current role will not change."

At this stage it seems likely that the process will extend beyond September 2015.

## THE PROCESS: IANA STEWARDSHIP

Numerous working groups have been formed to focus on the issues. ICANN has tasked a group, called the IANA Stewardship Transition Coordination Group, to deliver a proposal to transition the stewardship of the IANA functions from the US government to the global multi-stakeholder community. The proposal will cover the three aspects of IANA's role: naming, numbering and protocol parameters.

Naming has been identified as the key issue for focus. The numbering and protocol communities have already finalized their reports on IANA transition.

## RISK OF FRAGMENTATION OF IANA: DIFFERENT SOLUTIONS FOR NAMING, NUMBERING AND PROTOCOLS?

The focus of attention at ICANN is always on naming — a fact reflected in this paper — but IANA covers other key resources: Internet Protocol addresses, Autonomous System Numbers and protocols, which are likely to increase in significance in the Internet's next iterations (such as the "Internet of Things"). There are risks to the process to be considered if the naming, numbering and protocol communities decide to pursue different courses. The communities serving numbering and protocols have always had semi-autonomous relationships with ICANN. They do not recognize ICANN as having policy-making authority over their communities, and for this reason contribute comparatively less financially than ICANN's contracted parties. These communities will get involved on an ad hoc basis when they believe their expertise is relevant, but they do not have a formal role within the GNSO PDP. When the call went out for solutions to IANA transition, the numbering and protocol communities quickly concluded their work.

Uneven progress or the prospect of different solutions may pose a risk of fragmentation. There is strength in having combined oversight linked to ICANN in some (yet-to-be-agreed) form. However, the protocols and naming community could easily function without this. Having oversight of all IANA functions under one central unit would be more efficient and would elevate the status of that oversight organization (with each arm still able to set its own policies). Separation would make it easier for

<sup>9</sup> See [www.ntia.doc.gov/speechtestimony/2014/remarks-assistant-secretary-strickling-icann-high-level-governmental-meeting](http://www.ntia.doc.gov/speechtestimony/2014/remarks-assistant-secretary-strickling-icann-high-level-governmental-meeting).

individual numbering and protocol agencies to build out independent power bases, and could leave ICANN more vulnerable to external threats. Failure scenarios would also become more complex, in particular if the naming stream is out on its own in terms of oversight.

## IANA: NAMING FUNCTIONS

In respect to naming, two cross-community working groups have been formed: IANA stewardship in relation to domain names (the IANA Working Group), and general accountability issues relating to ICANN (the Accountability Working Group).

The IANA Working Group membership has already produced impressive results. ICANN proposed the formation of the IANA Working Group in June 2014, and by August a draft charter was published, which committed to follow an “open, global and transparent process” and “provide the opportunity for participation by all stakeholders and interested or affected parties” (ICANN 2014b). By November 2014, the IANA Working Group reported that agreement on key principles (ICANN 2014c) for the successor process was “nearly complete,” including:

- security and stability;
- accountability and transparency of any oversight, including independence, protection against capture, appeals and redress;
- service levels — at present, the draft is exploring potentially different handling for country-code TLDs (such as .se, .de, .uk) and gTLDs (such as .com, and new endings such as .guru, .photography);
- diversity — any transition needs to reflect the diversity of arrangements between IANA and its customers;
- separability of the IANA functions from the current operator, if warranted; and
- multi-stakeholder — any mechanism must draw its membership from “a full range of stakeholders.”

## WHAT MECHANISMS COULD BE SUITABLE FOR THE IANA STEWARDSHIP?

While it has been straightforward to articulate high-level principles, identifying mechanisms to implement them has proved more challenging.

Mechanisms suggested by the IANA Working Group have been criticized for being overly bureaucratic (Mueller 2015), to the extent of potentially introducing risks into the system: “how will the community protect against processing delays and the potential for politicization of

the system?” (Strickling 2015). While the current proposals may be over-engineered, there are clear benefits in consulting IANA customers on operational issues, and in having some form of multi-stakeholder review of the service, as the IANA Working Group is proposing. The latter could perhaps be incorporated as an additional Affirmation of Commitments review.

Of greater concern is the identity of the proposed contracting entity to replace the US government. While ICANN management and a minority of stakeholders support integrating the IANA function into ICANN, the majority favour structural separability — i.e., the ability for the IANA to be taken away from ICANN. Current proposals call for the creation of a shell company, “Contract Co.,” which would have no assets and no other function. While this may fulfill the need for there to be a legal entity to enter the contract, it is hard to imagine a shell company having the self-confidence to trigger a rebid or change the IANA function provider. The jurisdiction in which Contract Co. would be formed is described as a “sleeper issue,” with contributors from China, Brazil and India calling for it to be established in a “neutral country” (Mueller 2015).

Why is structural separability seen as important? As Steve DelBianco (2014) states, “The current IANA contract serves to hold ICANN accountable to an entity other than itself....Accountability means answering to someone or something that has the power to censure or correct. No such function exists for the ICANN Board today, with the imperfect exception of the IANA contract.”

However mundane the reality of US government involvement, the IANA oversight provides a symbolic umbilical cord between ICANN and an external body. Once cut, there would be no external constraints on ICANN, a private, unregulated monopoly with control over global critical Internet resources.

This is the reason why the IANA transition has to take place within a wider conversation about ICANN’s accountability.

## LINKS TO ICANN’S GENERAL ACCOUNTABILITY

The Affirmation of Commitments requires that a review of ICANN’s Accountability and Transparency be conducted every three years. To date, two such reviews have been completed by the Accountability and Transparency Review Team (ATRT). Within the framework of the ATRT reviews, ICANN’s accountability issues are reasonably well understood, but by no means resolved.

Nevertheless, issues surrounding ICANN’s accountability are complex and difficult to unravel. Progress on implementing the recommendations of the first and second

ATRT reviews has been uneven. Key weaknesses and risks persist, such as the effectiveness of ICANN's board, the role of governments and the influence of the domain name industry in policy-making processes. There is also a systemic risk, which the IANA contract has masked to some extent: in law, directors owe fiduciary duties to the company. In a regular company, the interest of the company is interpreted as the interests of its shareholders or members (who also have the power to remove directors by ordinary resolution). ICANN has no membership, so how should we understand ICANN interest, as a company?

There are also classic corporate governance problems between the community and ICANN staff, such as information asymmetry, information arbitrage and moral hazard. This is not always obvious, since ICANN's policy-making processes observe extremely high levels of transparency, even if the sheer number of simultaneous policy initiatives can sometimes create a fog that only insiders seem able to penetrate.

The same levels of transparency are not always observed in corporate governance issues, such as staffing and internal decision making. In other areas where improvements have been made, such as finance, effective horizontal and vertical checks and balances remain weak. ICANN's general accountability is a complex issue, and one that will take time to improve.

## IANA AND ICANN'S ACCOUNTABILITY: INTERDEPENDENT OR INTERRELATED?

In its first response to the US government announcement, ICANN's leadership appeared unwilling to create a dependency between the IANA transition process and ICANN's wider accountability. It was only in the final quarter of 2014 that ICANN began to make unambiguous commitments to a parallel, and dependent, accountability stream. This reflects normative pressure from the ICANN community and the US government: "This important accountability issue will and should be addressed before any transition takes place" (Strickling 2014a).<sup>10</sup> In a recent consultation, 100 percent of the responses agreed with this view (Corwin 2015).

For the management of ICANN, combining IANA transition with general accountability represents a risk: "Their fear, in a nutshell, was that complex debates over the massive reorganizations required to make ICANN's policy making processes and organs fully accountable would set the bar for the transition so high that it might never happen" (Mueller 2014).

Keeping discussions focused on the narrow technical and operational detail of IANA is not only within the comfort

zone of many ICANN participants, but is also capable of conclusion prior to September 2015. Throwing the issue open to include wider accountability issues risks bogging the entire process down for years. ICANN's leadership is also wary of the possibility of a UN General Assembly vote (December 2015) that could derail the process. Recent legislation (December 2014)<sup>11</sup> prevents the US government from spending appropriated funds on the IANA transition before September 2015, signalling that IANA transition has become a partisan issue within the US legislature. Another risk is that if discussions drag on beyond the next US presidential elections, the transition might stall. There is historical precedent for this: in 2005, the Bush administration appeared to step back from the Clinton administration's original commitment to release its hold over IANA.<sup>12</sup>

Conscious of these external threats and of the fact that improving accountability is "a never-ending discussion" (Chehadé 2014, 34), ICANN's executive at first resisted the IANA transition being dependent on advances in accountability: "when we talk about accountability, we talk about its interrelation with the transition, not necessarily its interdependency" (ibid.).

Meanwhile, members of ICANN's community viewed the IANA transition as perhaps a final opportunity to extract meaningful concessions on accountability — which have so far proved elusive, despite two reviews of its accountability and transparency — before the organization was cut loose from the US government.

In an unprecedented move, the leadership of all ICANN's supporting organizations and advisory committees — between which there is little love lost, and high levels of mutual suspicion — joined together to lobby the executive to change its mind (ICANN 2014a, 26 ff.; Cooper et al. 2014). Assistant Secretary Larry E. Strickling (2014a) echoed the community's view, "This important accountability issue will and should be addressed before any transition takes place." This combined normative pressure forced a change of course by ICANN's executive, but valuable time had already been lost. A separate accountability track, the Accountability Working Group, on which the IANA transition would be dependent, was formed toward the end of 2014.

11 See Omnibus Appropriations legislation, December 2014, section 540(a), [www.gpo.gov/fdsys/pkg/CPRT-113HPRT91668/pdf/CPRT-113HPRT91668.pdf](http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT91668/pdf/CPRT-113HPRT91668.pdf).

12 The US Principles on the Internet's Domain Name and Addressing System, June 30, 2005 states, "The United States...will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file." See [www.ntia.doc.gov/other-publication/2005/us-principles-internets-domain-name-and-addressing-system](http://www.ntia.doc.gov/other-publication/2005/us-principles-internets-domain-name-and-addressing-system).

10 See also [www2.itif.org/2014-key-principles-for-coordination.pdf](http://www2.itif.org/2014-key-principles-for-coordination.pdf) (section 12).

## ACCOUNTABILITY: IS IT ALL ABOUT TRUST?

The board's reaction to unanimous pushback from the community was to ask, "How can we strengthen the trust between all parts of the ICANN stakeholder community?" (Crocker and Chehadé 2014).

The response highlights a slightly unrealistic view of the forces at play within the broader ICANN structure.

While ICANN has quite stringent accountability mechanisms (see ICANN's Accountability and Transparency: Where Are We Now? below), these seem not to be trusted to work — at least by some vocal members of the community — and there are glaring weaknesses:

- no mechanisms for recall of individual board directors;
- the board's ability to amend the company's constitution (its bylaws); and
- the track record of board reconsideration requests (see below).

ICANN as a corporation is a largely unregulated, private sector body with control over critical Internet resources on which global economies depend. It has no natural competitors, is cash-rich (in 2014, its current assets were more than \$350 million, with a further \$145 million in deferred income), and directly or indirectly supports many of its participants and other Internet governance processes.

Without effective accountability and transparency mechanisms, the opportunities for distortion, even corruption, are manifold.

In such an environment, it is not sufficient simply to invoke trust.

According to P. Sztompka (1998),<sup>13</sup> a democratic culture of trust can be created through the institutionalization of distrust within the architecture of democracy. Accountability is highlighted as a key mechanism in achieving this. Rather than invoking trust, it may be more realistic to expect levels of mutual tension and mistrust between the executive and different parts of the community. Each has a role in holding others to account and ensuring balanced outcomes.

<sup>13</sup> Thanks to Jeanette Hofmann for bringing this work to the author's attention.

## ICANN'S ACCOUNTABILITY AND TRANSPARENCY: WHERE ARE WE NOW?

### STRENGTHS

#### High Levels of Transparency in Policy Process

ICANN's policy processes serve as a model for transparency and have influenced external organizations, such as the Internet Governance Forum. Every working group call and face-to-face meeting is transcribed and archived (along with mailing lists and policy documents). Even operational budgets are put out for public comment. Each stage in a policy-making process is sent out for public comment, and the quality of inputs is often extraordinarily high.

In recent years, ICANN has worked hard to internationalize its processes. Transcriptions are now provided in the six UN languages, and ICANN has a road map to improve the quality and quantity of materials available.<sup>14</sup>

It has also developed effective tools to assist remote participation, both in coordinating volunteers' calls and providing virtual meeting rooms, and in live streaming of meetings. While the experience of participating remotely can be frustrating (particularly for those in developing countries with poor bandwidth), ICANN has continued to improve its support for remote participants, for example by providing dial-out services to those struggling with connection.

The published archive comprises an important historical record and provides a way for new participants to read into the issues. The scale of activity can make it daunting for newcomers, and ICANN tries to address this by providing special resources and sessions at ICANN meetings for the orientation of new participants.

#### Systematic, Regular Review

To promote a culture of accountability and transparency, the Affirmation of Commitments provides for four types of review to take place at three-year intervals. Reviews are conducted by volunteers, who are selected by the CEO of ICANN and chair of its Governmental Advisory Committee (GAC). The fact and quality of the reviews are impressive. An area for improvement is ICANN's tracking and reporting of its implementation of review recommendations, but this is an area that continues to evolve as the cycle of regular review becomes established. For example, ICANN recently published a fairly clear digest of progress on implementation of the second ATRT

<sup>14</sup> See [www.icann.org/translations](http://www.icann.org/translations).

review's (ATRT2's) recommendations.<sup>15</sup> The Affirmation of Commitments reviews have some impact as normative controls, but there are no sanctions for the board if they ignore or fail to implement their recommendations.

### ICANN Board: Steady Improvement

In its evaluation of progress since the first review, the ATRT2 noted widespread improvements in board selection, performance and work practices, including declarations of interest since 2009. It also noted that community feedback indicated satisfaction with the term length for directors.

### A Learning Community

ICANN as a corporation and community is committed to continuing improvement. The ATRT2 tracks progress on implementation of the ATRT review's recommendations since 2009, providing a valuable feedback loop.

While tensions are apparent in key policy-making constituencies (such as the GNSO), other pockets of the ICANN community retain a culture of collegiality and information exchange, even as participation has internationalized and the financial stakes have increased. Examples include the security community and country-code operators. Cross community working groups are now becoming more frequently used, and this counteracts the tendency toward stakeholder silos within policy making.

### Participation Is Increasing and Gradually Internationalizing

While participation in ICANN's core policy-making engine, the GNSO, continues to be dominated by North American and industry participants (ICANN 2013, A2), other communities within ICANN are internationalizing. The GAC now has 146 members and 31 observers,<sup>16</sup> compared with 94 members in 2009.<sup>17</sup> ICANN's At-Large Advisory Committee has also expanded its membership and ambitions since 2009. It now has approximately 150 At-Large Structure members, and holds regular summits.<sup>18</sup> The Country Code Names Supporting Organisation has also increased its membership to 152,<sup>19</sup> compared to

about 100 in 2009.<sup>20</sup> These developments are helping to internationalize parts of the ICANN community.

## RISK AREAS

### Inevitable Tensions

#### All Stakeholders Are Equal, but Some Stakes Are More Equal than Others

ICANN's "community" is heterogeneous. The size and nature of stakes varies between stakeholder groups. Domain industry players are highly motivated and generally well resourced to participate in policy discussions, as the outcomes have direct operational and financial impact on their business. Conversely, for the world's three billion Internet users, while reliant on critical Internet resources, the costs of participation in ICANN processes outweigh the perceived benefits (if any), and therefore the drivers to participate are weaker. The costs of participation in ICANN's lengthy processes outweigh any perceived benefits.

End-users and governments, while recognized in the ICANN framework and increasingly active in giving policy input, do not form part of the official, bottom-up policy-making process — the GNSO PDP.

### Barriers to Participation

As with any technical arena, there is a relatively high knowledge threshold for getting involved. ICANN is rich in jargon and acronyms. Policy processes are lengthy, requiring a high level of time commitment. ICANN's executive identifies "volunteer fatigue" (ICANN 2013, A19, A46) as a factor affecting participation in policy development. Some of this is inevitable in an area that intersects technology and international public policy, but it does raise questions about whether a volunteer model can scale and survive as ICANN continues to expand and internationalize.

### Balancing the Conflicting Interests of Stakeholders

Any policy process needs to find ways of balancing the conflicting, legitimate interests of different stakeholder groups. In the ICANN context, while the bottom-up process unquestionably delivers multiple viewpoints to the table, it is less clear that the policy outcomes achieve the required balance. To some extent, this is a feature of any policy process. The difference is that a bottom-up process requires the board (despite having ultimate authority on behalf of the corporation) to assume a passive role in policy making. If the community delivers an outcome that threatens the

15 See [www.icann.org/news/announcement-2-2015-01-30-en](http://www.icann.org/news/announcement-2-2015-01-30-en).

16 See <https://gacweb.icann.org/display/gacweb/About+The+GAC>.

17 See page 7 of the House of Commons European Scrutiny Committee's *Thirteenth Report of Session 2009–10* at [www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/5-xii/5xii.pdf](http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/5-xii/5xii.pdf).

18 See <https://community.icann.org/display/als2/ATLAS+II+Declaration>.

19 For more details on Country Code Names Supporting Organisation membership, see <http://ccnso.icann.org/about/members.htm>.

20 See the Survey of Attitudes within the Country Code Names Supporting Organisation Committee regarding strategic priorities for ICANN, [www.ccnso.icann.org/surveys/strategic-priorities-for-icann-oct09-en.pdf](http://www.ccnso.icann.org/surveys/strategic-priorities-for-icann-oct09-en.pdf).

public interest, the board cannot be relied upon to step in and undo the community's work. Occasionally the board has sent back policy recommendations as not being in the public interest,<sup>21</sup> or has intervened to set deadlines for GNSO PDP working groups. Such decisions are rare, and have generated pushback from the community against perceived overreaching by the board.

Instead, disgruntled stakeholders take their concerns to the GAC, the GNSO Council or ICANN staff (*ibid.*, A54). This is viewed by some participants as undermining the bottom-up process; others are more sanguine, seeing it as part of the rough and tumble of policy making. For example, GAC intervention late in the gTLD program may have delayed the launch (to the detriment of potential applicants and of ICANN), but did strengthen some public interest aspects and arguably signalled a new phase of more proactive involvement in policy making by governments within the ICANN process.

But the ad hoc workarounds highlight a problem with the bottom-up process: what happens if a policy is crazy or bad? Who looks after the public interest?

## Non-inevitable Tensions

During ICANN's first decade, it was frequently referred to as "the ICANN experiment," because it is unusual to find a global public good operated through a California non-profit corporation. While ICANN generally functions well, its corporate structure can cause tensions.

### Directors' Fiduciary Duties versus the Public Interest

According to ICANN's bylaws, the corporation's mission is described in technical terms: coordinating the DNS, Internet Protocol addresses, Autonomous System Numbers, and protocol port and parameter numbers; operating the DNS root server (IANA function); and coordinating "policy development reasonably and appropriately related to these technical functions."<sup>22</sup> The public interest is hardly mentioned (except in number six of ICANN's core values in relation to promotion of competition<sup>23</sup>).

Meanwhile, in law, directors owe fiduciary duties to the corporation, which normally means the members or shareholders. But ICANN has no members or shareholders. So, how can the corporation's interest be understood? In practice, it can be interpreted as avoiding

decisions that may lead to the corporation being sued. An example is the handling of new gTLD applications, which many viewed as overly liberal. While the public interest may have motivated such a position, on the basis that it would introduce competition into the namespace, at least one commentator interpreted it as motivated by fear of litigation: "Specifically, in dealing with the issue of plural and singular strings, ICANN took a very liberal position that they are not confusingly similar and appear to have pushed this decision to the objection panels so as to not have to be accountable for terminating some future strings" (Gomes 2013). The "very liberal" position seems to have applied across the board to new gTLD applications, with the overwhelming majority having passed initial evaluation.<sup>24</sup>

### Review of Board Decisions and Recall of Directors

With no membership, ICANN's directors represent the end of the line in terms of accountability. While there is a formal mechanism to review board decisions, the review is conducted by a subset of the same people. The ATRT2 noted that community perception that Reconsideration Requests "all end[ing] up in a negative decision" was borne out by analysis of the results: 100 percent were rejected (ICANN 2013, 53 ff.)! The ATRT2 recommended that the board convene a special community group to discuss options for improving the process.

One of the key powers of a company's membership is the ability to remove directors. With no membership, there is no obvious way to recall individual directors mid-term. This does not imply a "nuclear option" of removing the entire board at once, which is obviously undesirable. It means targeted intervention (removal of an individual) without creating instability.

A company's membership also serves accountability objectives by receiving financial accounts and appointing auditors. While in most companies these are treated as formalities, they can provide a focal point for shareholder activism.<sup>25</sup>

A company's membership is also the usual authority to change its bylaws (by super-majority or special resolution). ICANN's board has the power to change bylaws without recourse to a higher authority — and this has caused concerns in discussions over accountability.

21 For example, ICANN Resolution 2014.0.16.16 states that the board specifically carves out the possibility of rejecting the recommendations of the Accountability Working Group if the board believes they are not in the global public interest. See [www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d](http://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d).

22 See Section 1, [www.icann.org/resources/pages/governance/bylaws-en#1](http://www.icann.org/resources/pages/governance/bylaws-en#1).

23 *Ibid.*

24 See <https://gtldresult.icann.org/applicationstatus/viewstatus>. 1,783 out of 1,930 applications passed initial evaluation (92 percent), and a further 35 applications passed at the extended evaluation phase.

25 For example, Cedric the pig was brought to British Gas' Annual General Meeting in a shareholder protest against executive pay. See [www.ft.com/cms/s/0/63ad9d3e-3b92-11df-a4c0-00144feabd0.html#axzz3Qt9Vwq3e](http://www.ft.com/cms/s/0/63ad9d3e-3b92-11df-a4c0-00144feabd0.html#axzz3Qt9Vwq3e).

Introducing a membership into ICANN's corporate structure would not be a straightforward task. How would balance be ensured, to prevent capture by special interests? While directly interested parties — such as registries and registrars — could be relied upon to join up in numbers, incentives to become involved are low for others, such as Internet users. The rambunctious nature of some community interactions may be viewed as risking the stability or legitimacy of ICANN as an entity if translated into direct corporate power. On this view, ICANN's board represents a more stable, predictable and responsible body than the ICANN community. Such concerns appear incompatible with support for multi-stakeholder governance; in essence, they translate to suspicion of “mob rule,” and a view of ICANN's leadership as master rather than servant of the wider community.

Some entities, including some governments, may not feel able to join a California corporation as a member. Such entities have found ways to participate in the ICANN community through proxies, such as stakeholder groups or advisory committees. Consultation with relevant stakeholders will be essential to understand and remove barriers to participation.

No doubt, creating a membership would require changes to ICANN's existing bylaws, and could bring associated risks. Such risks are not unique to ICANN, but are shared with other non-profits and charities around the world, whose governance experiences can be learned from. One possibility may be to map the current structure of the ICANN community into a membership. A one-member, one-vote system may prevent concentrations of voting power.

But without a membership, accountability can only be achieved through normative pressures. No structure will deliver perfection; to misquote Winston Churchill, a membership is the worst form of governance except for all those other forms that have been tried.

### Building Trust: The Panopticon Paradox

Literature on governance urges complete transparency as an unquestioned benefit. Jeremy Bentham's utilitarian discussion of the “panopticon” (1785) predicts that when people believe they may be watched at every moment, they will act compliantly and become, as Michel Foucault put it, “docile bodies.” Transparency can help to deliver accountability in situations where there is natural information asymmetry, as between staffers and the communities they serve. Community members (and directors) do not spend all their time working in the organization and cannot know everything that goes on there. The panopticon gives the potential for anything to be made public at any moment.

But Bentham's pantopticon was a design for a prison. Prisoners think prisoners' thoughts and quickly begin to act in distorted ways (see Haney, Banks and Zimbardo 1973) — either through submissiveness, slavish adherence to rules, or even distress and anxiety. Interactions between prisoners and guards quickly become “negative, hostile, affrontive and dehumanizing,” leading to a breakdown in solidarity between prisoners.

Although criticized for its ethical failings, Zimbardo's prisoner experiment has eerie similarities with anecdotal evidence from ICANN staff and former staff.<sup>26</sup> It is easy to feel besieged by the “community” members whose own behaviour can become distorted through a sense of power and entitlement.

Within the atmosphere of mutual distrust identified by the board, these behaviours can only intensify. Sztompka (1998) predicts that a pervasive, generalized climate of suspicion tends to mobilize defensive attitudes, hostile stereotypes, rumours and prejudices. For example, both the ATRT and the WHOIS Policy Review Team (both constituted under the Affirmation of Commitments) commented on the difficulties they encountered in getting basic operational and financial information from staff on aspects that were central to their work (ICANN 2013, Appendix E).<sup>27</sup>

ICANN's generous pay and reward schemes, coupled with difficulties in finding comparable employed positions elsewhere in the small domain name policy space, can become drivers against transparency. Analysis of ICANN's audited accounts and filed IRS 990 forms show that from 2011 to 2013, the average salary per person at ICANN was above \$170,000. Excluding highest-paid executives (as declared on the form), average pay still exceeded \$138,000,<sup>28</sup> and across the staff base, salaries increased by between 11 and 16 percent in fiscal years 2012 and 2013, against US inflation rates of three percent or lower. Employee benefits are exceptionally generous, including full health care, and a pension contribution of up to 15 percent of salary (and five percent paid even if the employee does not

26 See Maria Farrell's blog (under previous ICANN leadership), <http://crookedtimber.org/2011/03/19/the-hollowing-out-of-icann-must-be-stopped/>. “People are afraid to speak frankly internally, and to speak unpalatable truths behind closed doors, the sorts of things that need to be discussed to allow the organization to function efficiently.”

27 See also the addendum and page 44 of the *WHOIS Policy Review Team: Final Report*, [www.icann.org/en/system/files/files/final-report-11may12-en.pdf](http://www.icann.org/en/system/files/files/final-report-11may12-en.pdf).

28 See [www.icann.org/resources/pages/governance/historical-en](http://www.icann.org/resources/pages/governance/historical-en) for ICANN's IRS 990 forms for the fiscal years 2011–2013. Note that with the expansion of ICANN's staff base in 2014, the average salary per person appears to have dropped to below \$100,000 (fiscal year 2014 form 990 has not yet been filed).

make contributions).<sup>29</sup> There are powerful financial and social drivers for staff to stay in position, and not to place their employment at risk by raising concerns. The ATRT2 noted that previous recommendations (in 2006 and 2007) to introduce a whistle-blowers' policy had not yet been implemented.

Another perverse consequence of expectations of hyper-transparency is a tendency to overuse legal or other confidential channels, or to overuse redaction in official communications. An example is the board's response to the WHOIS Policy Review Team's recommendations,<sup>30</sup> which one commentator described as "a model of non-communication, and it comes replete with Orwellian gaps in the texts, redactions which force you to ask where the words have gone and why?" (Carr 2012).

The message here is not that transparency is bad. Quite clearly, there is a requirement for transparency in ICANN's operations. But in situations where there is keen community attention focused on staff, coupled with low levels of trust, there may be perverse consequences that create accountability risks.

### A More Inclusive Policy Process

Key stakeholder groups (users and governments) are not part of the core policy-making framework, ICANN's GNSO. The ATRT2 identified major issues affecting the GAC's ability to effectively interact with board and community, which have an "impact on the accountability, transparency, and perceived global legitimacy of ICANN" (ICANN 2013, 39, recommendations 6.1–6.9). The report also identified a lack of clarity or understanding of GAC working methods, GAC advice being poorly understood outside of government circles and GAC participation in policy development processes described as "limited to non-existent" (*ibid.*).

This causes problems of legitimacy and can disrupt the policy-making flow, causing ill feeling and eroding trust. N. Vallejo and P. Hauselmann (2004) observe that legitimacy suffers due to lack of stakeholder diversity, even if that diversity increases the time frames and costs of policy making. At ICANN, with the exception of the At-Large Advisory Council, there is almost no participation by advisory committees or other supporting organizations in providing comments within the formal GNSO PDP (ICANN 2013, A39, paragraph 5.1.4.3).

<sup>29</sup> See ICANN Benefits Overview for 2014 at [https://icanncareers.silkroad.com/map\\_images/main/SiteGen/icannnext/Content/Uploads/Unplaced\\_Documents/2014\\_ICANN\\_Benefits\\_Overview\\_Newsletter\\_AN\\_2-1.pdf](https://icanncareers.silkroad.com/map_images/main/SiteGen/icannnext/Content/Uploads/Unplaced_Documents/2014_ICANN_Benefits_Overview_Newsletter_AN_2-1.pdf).

<sup>30</sup> See the ICANN board response to the WHOIS Review Team recommendations, November 2012, [www.icann.org/en/system/files/bm/briefing-materials-1-08nov12-en.pdf](http://www.icann.org/en/system/files/bm/briefing-materials-1-08nov12-en.pdf) accessed 6 February 2015.

These key stakeholders — governments and end-users — perceive that they don't choose the policy issues or the timing, and try to respond as best they can; they have limited tools available for timely participation. However, without integration into the GNSO process, their inputs tend to be ad hoc and late. This creates tensions and inefficiencies, with stakeholders on the inside of the policy-making procedures perceiving such interventions as circumventing or undermining the bottom-up processes.

### Financials: ICANN — Not Your Average Not-for-profit

The Internet governance space is replete with rather well-funded not-for-profit organizations, including ICANN. ICANN's financial strength, coupled with its unique control over global critical Internet resources and limited scrutiny of its finances, represents an accountability risk.

Even before the new gTLD program, ICANN had enviable financial reserves (current assets of \$46 million in 2007 increasing to \$399 million in 2013<sup>31</sup>). The following analysis excludes income and expenditure relating to the new gTLD program, which ICANN has accounted for separately. However, such a large influx of cash appears to have relaxed leadership attitudes toward general expenditure, as evidenced in the travel budget, for example.

### ICANN's Income

Turnover (excluding exceptional items, such as the new gTLD program) increased from \$51 million in 2008 to \$78 million in 2013. This is generous provision for a staff base of 150–200.

ICANN's main source of income is a percentage of domain name registration and renewal fees, paid by registries<sup>32</sup> and registrars.<sup>33</sup> Because of the dynamics of the domain name market, 55 percent of ICANN's turnover is provided by two companies.<sup>34</sup> In any business, such financial dependence on so few customers would create risks. In a public interest company, there is even more cause for concern, particularly as ICANN also has a contractual compliance function over those companies. There are at least theoretical conflicts in the dual roles of supplier and regulator.

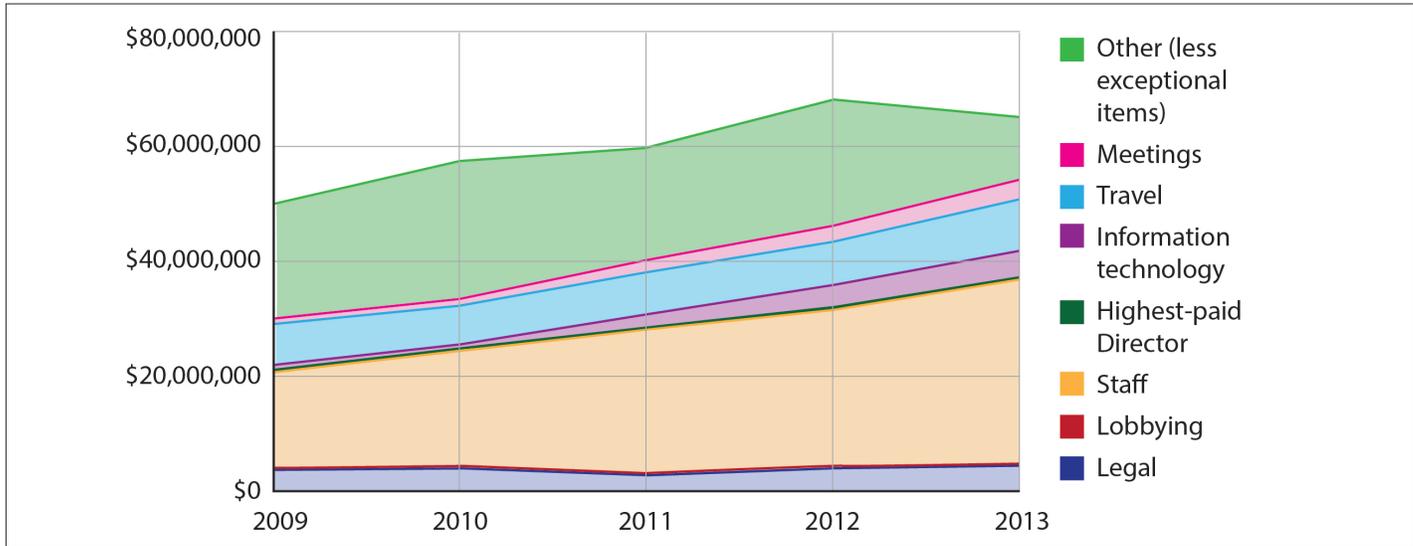
<sup>31</sup> See [www.icann.org/resources/pages/governance/historical-en](http://www.icann.org/resources/pages/governance/historical-en) for ICANN's IRS 990 forms for the fiscal years 2007–2013. Note that the majority of current liabilities comprise deferred income, which (while correctly handled in the accounts) depresses the current ratio.

<sup>32</sup> See footnote 3, specifically section 7.2 of the .com Registry Agreement.

<sup>33</sup> See page 86 of the *FY15 ICANN Operating Plan and Budget* at [www.icann.org/en/system/files/files/adopted-opplan-budget-fy15-01dec14-en.pdf](http://www.icann.org/en/system/files/files/adopted-opplan-budget-fy15-01dec14-en.pdf): "Transaction based fees...This fee will be billed at \$0.18 per transaction for registrars operating under the 2009 or 2013 RAA."

<sup>34</sup> See page 22, Concentration of Credit Risk, at [www.icann.org/en/system/files/files/financial-report-fye-30jun14-en.pdf](http://www.icann.org/en/system/files/files/financial-report-fye-30jun14-en.pdf).

Figure 1: ICANN Expenses over Time



Data source: ICANN IRS 990 forms, 2009–2013. [www.icann.org/resources/pages/governance/historical-en](http://www.icann.org/resources/pages/governance/historical-en).

### Expenditure Analysis

ICANN’s main cost centres are staff (41 percent of turnover in 2013), travel (12 percent), meetings (5 percent) and IT (6 percent, an increase from 1 percent in 2010).<sup>35</sup> Lobbying represents less than one percent of turnover, but has grown from nothing prior to 2009. “Other” expenses in 2013 (excluding new gTLDs) totalled \$12 million, including translation and interpretation services (\$1.6 million) and consulting services of \$7.4 million.

There was a sharp increase in travel and meetings expenses in 2014 (22 percent of turnover, an increase of 55 percent versus the previous year). While the total figure has reduced in the forecast for 2015, the number of public meetings has also reduced by 25 percent. The travel spending per public meeting has risen from \$1.8 million in 2011 to \$3.6 million in 2014.

Travel costs are partly driven by staff and board members, but ICANN also supports many members of the community. In part, this is a quid pro quo for the thousands of volunteer hours contributed to policy work by the community.

ICANN used to publish reports of travel support per meeting,<sup>36</sup> but the practice seems to have dropped off in

recent years. The 2015 operating plan also details additional budget requests of \$680,000, mostly comprising requests by community members for travel support, including attendance at other Internet governance meetings such as the Internet Governance Forum.<sup>37</sup>

This is an area where strict accountability should be observed. By way of comparison, analysis of Google’s political expenditure by Public Citizen’s Congress Watch concludes that through “soft power” (Nye 2004) organizations can accrue “influence in ways that are much less visible and less regulated than through conventional lobbying” (Public Citizen 2014). Not only is ICANN directly funding attendance at its own public meetings, it is also a key financial contributor to other processes such as the UN Internet Governance Forum (\$330,000 in fiscal year 2015),<sup>38</sup> the 2014 NETmundial meeting in Brazil (figures not available at time of writing) and the new NETmundial Initiative (a reported \$200,000 pledged in 2014),<sup>39</sup> all of which advocate the multi-stakeholder model of Internet governance.

### Impact of the New gTLD Program

Opening the new gTLD application window in 2012 changed ICANN’s fortunes, yielding nearly \$200 million in application fees in 2012–2014. Processing the applications themselves cost ICANN more than

35 Analysis excludes exceptional gTLD income and expenditure. See ICANN’s IRS 990 forms for 2009–2013 at [www.icann.org/resources/pages/governance/historical-en](http://www.icann.org/resources/pages/governance/historical-en).

36 See the Summary Report on Travel Support for ICANN’s 47th International Public Meeting, in Durban, South Africa, 2013, [www.icann.org/en/system/files/files/funded-travel-durban-22aug13-en.pdf](http://www.icann.org/en/system/files/files/funded-travel-durban-22aug13-en.pdf), which indicates total expenditure of over \$800,000 on 173 community attendees, including 30 ICANN fellows, 22 GAC, 20 GNSO and 20 Nominating Committee.

37 See page 75 ff. of the *FY15 ICANN Operating Plan and Budget* at [www.icann.org/en/system/files/files/proposed-opplan-budget-comments-fy15-16jun14-en.pdf](http://www.icann.org/en/system/files/files/proposed-opplan-budget-comments-fy15-16jun14-en.pdf).

38 See [www.icann.org/resources/press-material/release-2014-12-18-en](http://www.icann.org/resources/press-material/release-2014-12-18-en).

39 See [www.theregister.co.uk/2014/12/12/im\\_begging\\_you\\_to\\_join\\_netmundial\\_initiative\\_gets\\_desperate/](http://www.theregister.co.uk/2014/12/12/im_begging_you_to_join_netmundial_initiative_gets_desperate/).

\$70 million (a net profit of more than \$130 million, excluding auction fees). So far, 400 new gTLDs have been launched, totalling four million individual domain name registrations, an average of 10,000 domains per new gTLD registry.<sup>40</sup>

Although ICANN has observed strict separation of new gTLD income and expenditure in its accounts, the new gTLD windfall seems to have loosened ICANN's financial control. Where in earlier years, ICANN would typically have a net profit margin of approximately 14 percent (2009–2011), in 2012, this dropped to 0.8 percent, and the organization even made a small trading loss in 2014.

### What Financial Accountability Measures Exist?

ICANN has professionally prepared and audited accounts, and submits required non-profit tax forms. It also consults the community on its operating budget, and staff provide a high level of detail in these consultations.

Unlike for-profit companies, where the shareholders' principal motivation is financial, members or communities of non-profits can be rather sleepy about the finances. With ICANN, the level of community input and expertise on financial matters is not extensive. There were only four public comments on the 2015 fiscal year operating plan,<sup>41</sup> although some were high quality<sup>42</sup> on the fiscal year 2015 operating plan. Still, the high level required for financial reporting does not allow for close scrutiny appropriate to ICANN's public trust role and large financial reserves. ICANN has not yet evolved the network of semi- or fully independent financial checks and balances (such as public accounts committees, public auditors) seen in the public sector.

## CONCLUSIONS AND RECOMMENDATIONS

ICANN's community has responded positively to the challenge of transitioning oversight of the IANA functions to a suitable multi-stakeholder model, but the process will not be straightforward. The US government has signalled a willingness to renew the IANA contract in September 2015 if the deliberations are not complete. This will probably be necessary to give the ICANN community sufficient time to improve ICANN's general accountability, and to identify mechanisms that provide assurance without compromising

operational and technical efficiency. Other risks specific to IANA transition include unbundling oversight of the current IANA functions, and the jurisdiction and identity of any proposed Contract Co.

Although valuable time was lost in the initial failure to recognize that IANA transition is dependent on strengthening ICANN's overall accountability, the process is now underway. As part of this, ICANN's leadership has identified the need to strengthen mutual trust between the executive and community.

ICANN observes high standards of transparency in policy making, and its practices have influenced other fora such as the Internet Governance Forum. It is a learning organization, which is gradually becoming more internationalized, and has established review mechanisms into key areas including its accountability and transparency (although implementation of recommendations is uneven).

Some accountability risks faced by ICANN are inevitable in any organization with a global policy-making function: imbalanced stakeholder engagement, barriers to participation and/or conflicting stakeholder interests. Others are particular to ICANN and need to be resolved as a priority:

- potential conflict between directors' fiduciary duties to the company and the public interest;
- lack of effective mechanisms for review of board decisions and recall of individual directors;
- perverse consequences of transparency coupled with low trust levels between staff and community;
- more effective and timely mechanisms for governments and end-users to input into policy development; and
- strengthening financial transparency and oversight.

### RECOMMENDATIONS

Implementing the ATRT2 recommendations would satisfy concerns over review of board decisions and integration of key stakeholders into formal policy-making processes (the GNSO PDP).

In addition, ICANN could consider the following five recommendations:

- To avoid the risk of fragmentation, any solution for IANA oversight should apply to all current IANA functions.
- A culture of trust can be built by "institutionalizing mistrust" (Sztompka 1998), i.e., developing numerous horizontal and vertical accountability checks and balances. This can help overcome some

<sup>40</sup> See [nldstats.com](http://nldstats.com) for data on gTLDs. In reality, registration statistics are distorted by the near giveaway policy of .xyz (780,000 domains). Otherwise, the new gTLD market is showing a typical "long tail" pattern.

<sup>41</sup> See [www.icann.org/en/system/files/files/report-op-budget-fy15-29sep14-en.pdf](http://www.icann.org/en/system/files/files/report-op-budget-fy15-29sep14-en.pdf).

<sup>42</sup> See, for example, the comments of the Country Code Names Support Organisation, June 2014, <http://ccnso.icann.org/workinggroups/sop-comments-op-budget-fy15-19jun14-en.pdf>.

of the paradoxes associated with high expectations of transparency and low levels of trust.

- Align ICANN the corporation's interest with the public interest by introducing a membership that reflects the diversity of ICANN's community. This will not be straightforward, and further research is needed to identify suitable models and best practices to avoid concentrations of voting power within any one stakeholder group. In future, ICANN should proactively foster two-way dialogue between corporation and membership.
- As an ultimate sanction, ICANN's membership should have the power to recall individual directors and approve changes to bylaws.
- Strengthen the effectiveness of financial transparency and oversight. Consider implementing external checks and balances found in public sector environments.

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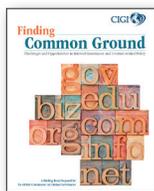
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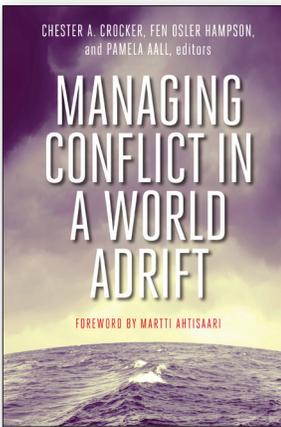
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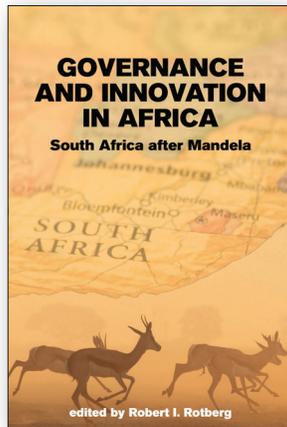


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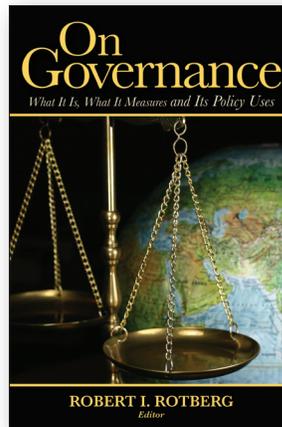


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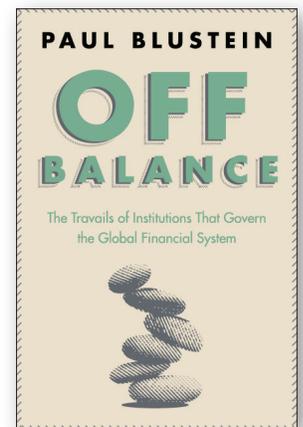


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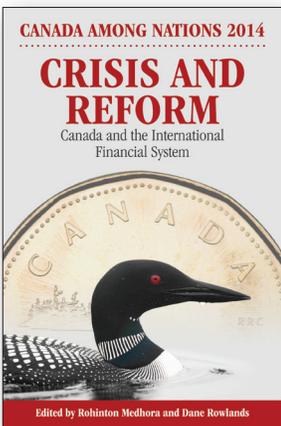


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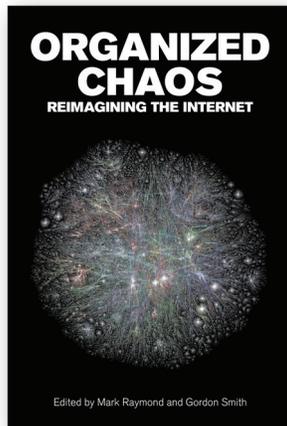


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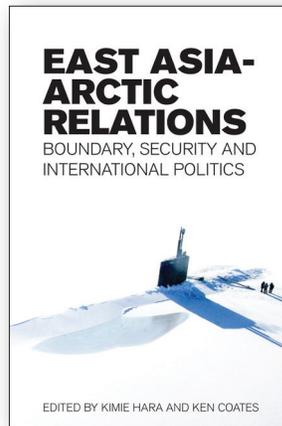


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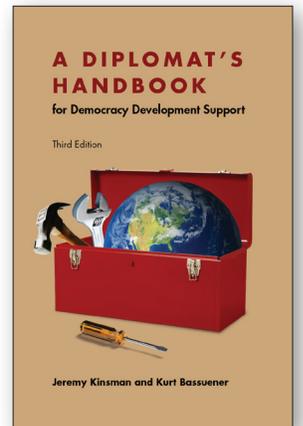


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