

Comments of Dr. Milton Mueller, Professor, Syracuse University School of Information Studies, Principal, Internet Governance Project, and Chair, ICANN Noncommercial Users Constituency.

RE: Domain Names Management (Cluster One B2 Assessment Report.)

This paper is a step forward. In matters of detail, certain corrections need to be made that will strengthen it significantly. There is one very important omission. Also, there needs to be a stronger link between the analysis presented in Sections 1 – 6 and the “Overall Assessment” made in Section 7.

1. Praiseworthy aspects of the report.

1.1 gTLD policies and criteria

It is true and important to note, as you do on page 7, that “there are no defined policies and/or criteria for a further development and broadening of the gTLD name space.” (Although page 3 notes that policy guidelines “are being developed” this is not very meaningful, because on contentious issues ICANN can take anywhere from 3 – 5 years to come up with a policy, and it has already been in existence for 7 years. In this case, delaying change is the same as denying change.) Note that gTLD creation is an issue that strongly affects two of the Working Group’s “Outcome Criteria:” *access for all* and *multilingualism*. The most promising demand for new TLDs is likely to come from implementation of Internationalized Domain Names at the top level. The creation of new IDN registries represents business opportunities for suppliers in the developing and non-western world. A slow, highly restrictive, conservative approach of the sort we can expect from the current ICANN system disadvantages new players outside the West relative to established, dominant players today. The report should take note of specific procedures that have been proposed to facilitate new TLD introduction, including the OECD report, my own co-authored report, and other reports by economists calling for auctions of new TLDs.

On a related issue, it would be a huge mistake to leave the introduction of IDNs to country code TLD managers, because that would diminish opportunities for new entry and competition. This would be the equivalent of restricting the introduction of mobile telephone service to the established monopoly wireline company. Advocates of national sovereignty must face the fact that language groups do not correspond to national boundaries, and thus the entry of IDN TLDs is unlikely to fall under their control unless artificially restricted.

1.2 WHOIS

It is excellent and fully justified that the overall assessment calls for a “reassessment of concerns over privacy with the WHOIS database.” There are two problems with this statement. First, the wording is ambiguous and possibly conveys the opposite of the intended meaning. It is not the “concerns over privacy” that need to be “reassessed,” it is the current WHOIS policy’s *absence* of privacy protection that needs to be reassessed.

Second, main body of the report needs to provide the descriptive and analytical background for this conclusion. As far as I can tell, WHOIS is not mentioned anywhere but in the conclusion.

WHOIS relates to the WSIS Process Criteria in regards to “Multilateralism,” and it affects human rights (privacy). Regarding multilateralism, the policy was imposed on gTLD registrars by ICANN’s accreditation contracts prior to the existence of any bottom-up process. As such, it reflects a policy imposed on ICANN unilaterally by the US Commerce Department in 1999, and it is now promoted by the US Government in trade agreements and its own ccTLD contract with the .us ccTLD. In general, WHOIS is a prime example of how supervision of ICANN by one country distorts its policy making process. Despite the contradiction between WHOIS requirements and the privacy laws of Europe and other regions, there are numerous documented instances of the US Congress and US government agencies (FTC, NTIA) pushing ICANN to adopt a particular approach to WHOIS, regardless of its organic policy making processes. I can supply the WGIG with detailed evidence upon request. The report should discuss this under Section 4 (Governance Mechanisms) under e.) Main Legal Documents and Contractual Arrangements. (Also, see my discussion of the RAA under 2.1 below)

1.3 UDRP

It was heartening to see the UDRP statement in Section 7, but it is flawed. It appears to equate protection of country names – which asserts a right that does not exist in any international forum – with protecting existing rights of noncommercial users to use trademarks, company names, geographic indicators, or country names for purposes of noncommercial expression and criticism. These rights of free expression by noncommercial users are enshrined in the UN human rights declarations, and have been routinely upheld by national courts. Yet they are often overridden by UDRP panels, in flagrant disregard of the applicable national laws. By way of contrast, the claims of governments regarding registration of country names in gTLDs have no basis in international treaties or laws, and as far as I know little if any basis in national laws either. To put it bluntly, national states have *no internationally recognized rights*, analogous to trademark rights, to exclusive global control over the use of country names, whether in the domain name space or elsewhere. Thus, the GAC recommendation on .info was an attempt to use back channel leverage over the DNS to legislate new rights. That is illegitimate. Furthermore, ICANN’s and Afiliacorp’s acquiescence in this demand was a violation of ICANN’s bottom up policy making process, because it completely bypassed the procedures that are supposed to be used to make policy.

This is precisely the sort of governmental interference with the technical administration of the domain name system that many in the Internet community fear. It is an example of why many people supported, and continue to support, exclusion of national governments from a governance role in DNS. If governments want to present themselves as “representing the interests of the people” then they need to cease reaching for this kind of power. When they act in such a fashion, they indicate that they are not representatives of the general public, but just another special interest seeking advantage from governance of the domain name system.

2. ICANN processes

2.1 Contractual governance: the critical missing link

In its description of ICANN, the report contains a rather glaring omission. In discussing governance mechanisms, it completely overlooks the contracts ICANN has with both gTLD registries and registrars.

You may have missed the forest for the trees. ICANN regulates by contract; its contracts provide global governance, avoiding the need for a potentially burdensome combination of territorial governance and international treaties among territorial authorities. The contractual model of governance is ICANN's key characteristic. It explains why it is a private sector actor and many other things about it.

The Registrar Accreditation Agreement (RAA) contract is one of the most important and far-reaching forms of contractual governance. Yet it is not even mentioned in the report. This is where ICANN's contracts touch the end user. On the supply side, one cannot enter the retail gTLD registration business without entering into an accreditation contract with ICANN. On the consumer side, if you register a gTLD domain name you will have to sign a contract, many key provisions of which were dictated by ICANN and cannot be avoided anywhere in the industry. RAAs are what bind end users to ICANN's UDRP and WHOIS requirements, for example. The report needs to note this.

Contractual governance as practiced by ICANN refutes the notion, put forward by the ICC comments, that "self-regulation" by industry is inherently more "market oriented" and "consumer driven" than governmental regulation. (This comment should not be taken as support for government regulation over industry self-regulation; it simply refutes an invalid claim regarding self-regulation.) Under ICANN regulation, with respect to many parameters of the business, end users *have no choice whatsoever*; the contract is imposed uniformly on all registrars and consumer choice is thwarted. Equally strong regulations are imposed on gTLD registries via their contracts, including rate regulation and new service regulation. The simple fact is that ICANN has more power over the domain name industry than the ITU ever had over the global telecommunications industry, and its policies have often restricted new entry and competition. It is an obvious fallacy to equate "governance by a private sector corporation" with "governance by the market," particularly when the corporation doing the governance has an unbreakable monopoly on entry into the business. I hope in their future comments the ICC will think more deeply about how markets work, and how different governance arrangements do or do not facilitate end user choice.

2.2 Application of WSIS criteria to ICANN

Is ICANN's contractual system of governance "multilateral, transparent, democratic?" It is not clear whether this question makes any sense. Both in this paper and in the one on Roles and Responsibilities, analysis of ICANN would be improved if the papers take a sharper focus on the problem of sovereignty and territoriality. There is a strong relationship between the form ICANN took and the global character of the Internet.

ICANN was set up as a “private” entity because of the need for global, nonterritorial forms of governance. It is widely understood that many aspects of the Internet require global governance, and attempts to impose territorial rules will not work. ICANN regulates by contract rather than by law, because law is inherently territorial in scope.

One could assert that the WSIS criteria could be met if the *content* of the contracts is determined by *processes* that are “multilateral/multistakeholder, transparent and democratic”. If one holds up ICANN to that standard, it fails the multilateral test, does well on the multistakeholder and transparency criteria, and does poorly on the democratic criterion. On the democracy criterion, ICANN would command much greater support – and would work better, too – if it renewed its commitment to the fully democratic, one member one vote mechanisms it originally planned to use to select half of its Board. The user-based elections have been replaced by mechanisms of self-selection that privilege vested interests and make it difficult if not impossible for change-agents to get on the Board. It is also unrealistic to expect the broad Internet user community to invest the time and resources required to build and sustain ICANN’s elaborate input and policy development mechanisms. Just give them a vote.

Discussion of ICANN processes fails to note one of the major weaknesses of ICANN’s structure, which is the danger that its full-time management (or its governmental supervisor(s)) will override or manipulate the bottom up processes of its constituencies. This is a well-documented problem in ICANN. As just one of many possible examples, one could look at the huge differences between the policy for reassignment of the .net TLD established by ICANN’s GNSO, and the actual RFP issued by ICANN’s staff. This problem needs to be noted in the report.

2.3 Details

As a minor note, the distinction between ICANN and IANA is purely nominal. IANA is just the name of a function performed by ICANN. IANA is not a separate actor; its staff are hired by ICANN and it implements ICANN policies. Therefore it is misleading to speak of them as if they are separate actors, as is done throughout the paper.

Slightly more minor, RFC 1591 is not the “basic description of DNS structure and delegation” RFCs 1034 and 1035 are. 1591 was written 10 years after DNS was implemented in order to clarify some of the political controversies that were emerging around ccTLD delegations. For a more detailed discussion of the historical context of RFC 1591, see Milton Mueller, [Ruling the Root: Internet Governance and the Taming of Cyberspace](#) (MIT Press, 2002), p. 124-127.

RE: Towards a Common Understanding of the Roles and Responsibilities of all Stakeholders in Internet Governance

In my opinion this paper is a long way from completion. It does not provide any clear, new ideas about the differentiation of roles and responsibilities. It provides a catalogue of different governance mechanisms and some of their features. It does not really engage seriously with the issue of how or why different entities should assume different governance roles. We need creative thinking, not a descriptive catalogue.

Not until the end, when the debate between national sovereignty and global “trilateralism” is discussed, does the report get interesting. I hope the WGIG will pursue this, and fully recognize that the Internet is global, not territorial. As the Internet Governance Project postulated in its September 9 contribution to the WGIG, “The Internet’s methods of establishing communication are non-territorial. The routing structure is independent of political jurisdictions and connection costs are insensitive to distance and political boundaries. This has created a non-territorial arena for human interaction and thus for policy and governance.” National governments need to explicitly accept the limitations of their control and sovereignty, and develop new accountability mechanisms appropriate to this problem. There are still important national interests at stake, but there are also global and regional constituencies involved in Internet governance that are not national. The problem is to combine national and global accountability in a creative way. Static, backward-looking assertions of national sovereignty will not get us anywhere.

It is not correct to view ICANN as “an NGO” like Amnesty International or the IETF. No one is required to adopt or use IETF standards. ICANN has exclusive control over the name and address roots of the Internet, which gives it governance and policy making powers. Again, it would be backward-looking to assert that ICANN is out of bounds because it is private and also making policy. ICANN, for better or worse, was the solution to the need for a global regime. The issue is how to create global governance mechanisms. If you do not have an alternative solution you are stuck with ICANN. National governments are often inadequate because of their territorial limitations and the high cost of coordinating their action. I therefore support the basic idea behind ICANN but believe its structure should be reformed: create better “top-down” accountability to international authorities that carefully limit its powers, create better “bottom up” accountability to Internet name and address users, and if possible, create alternative governance regimes so we don’t get locked in to a dysfunctional system.

Regarding the relationship between ICANN and governments, the IGP has proposed that governments limit themselves to arriving at an internationally agreed, narrowly defined mission statement for ICANN and the provision of an oversight function that prevents it from abusing its powers. If governments are broad-minded and progressive, they will attempt to establish an oversight regime that promotes a global public interest rather than simply asserting narrow national interests (although this may be a naïve hope). What we

do *not* need is a form of government oversight that provides an excuse for regular political meddling in the day-to-day decisions of DNS policy making. That would be worse than the status quo. IGP has also asserted that once proper inter-governmental oversight is established, ICANN's GAC should be abolished.