

Exploring the Challenges of a Governance Model for the Internet Corporation for Assigned Names and Numbers (ICANN): A Discussion Paper

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Introduction

Although I was a member of one of the special interest groups in ISOC, I am the member of this panel most distant from the current history of internet governance and well aware that I do not have the same familiarity with the issues that many of you have. These are issues that ICANN and the internet community have been wrestling with for the past decade. I hope that my comments and observations from “outside the box” will be of some use, generating fruitful discussion. I do not come with proposed solutions to the internet’s governance challenges, or the role of ICANN in that challenge, but I do hope that I bring from insights from outside the box.

The history of ICANN is well known and I need not repeat it here. It is worth noting however that the issue of internet governance has been an open issue from the very beginning. By 2005 the Tunis World Summit on the Information Society established the Internet Governance Forum (IGF). The purpose was a forum for conversation among multiple stakeholders about the future of Internet governance, broadly defined as:

“...the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.” *Report of the Working Group on Internet Governance (WGIG)*, June 2005), p.4.

This is a definition of the “what” but not the “how” of accountable governance. It is also not clear, as an element of governance, to whom it is responsibly accountable. There is a serious issue of a lack of consideration of the separation between ICANN’s “legislative role” and its “adjudication role”, as well as the relationship between those roles and the sovereign rights of nation states.

A year ago (2011) a meeting of three of the BRICS countries (Brazil, India and South Africa) pushed further, in part in reaction to the failures of the efforts start at Tunis in 2005. Their approach to accountable governance called for consolidating the independent work of ICANN (and the ITU) under the umbrella of the United Nations and its family of sister organizations. Below I explore the governance model of the International Labour Organization in light of this suggestion.

The current state of Internet governance, the IGF definition, and the 3BRICS proposal have achieved two things. First, they highlight the unsatisfactory and unsustainable current state of Internet Governance, and second, they highlight the extremely complicated nature of the challenges at hand. In fairness, ICANN this is not a situation in which someone, or some groups, can be blamed for an unsatisfactory state of affairs. To use a metaphor, When ICANN was born the Internet was a kitten. Now the Internet is a tiger and ICANN has the Internet Governance Tiger by the tail. I cannot let go and it has trouble handing on, while at the same time it is supposed to be steering the tiger.

Virtually every stakeholder group, be they nation states (e.g. BRICS), private sector entities (corporations, unions, etc.) or civil society groups (NGOs, etc.) feels that the existing governance system leaves their interests at risk. Also, in their eyes, ICANN's processes are neither transparent nor accountable enough ensure that outcomes reflect positions arrived at through reasoned dialogue and compromise between stakeholders.

The challenges facing Internet governance are complicated by the fact that ICANN cannot take a breather to re-assess its governance model (the tiger by the tail). It is in charge of the ongoing maintenance of a literally "exploding" Internet system. As well, ICANN is under continued pressure from vested interest stakeholder groups. Not surprisingly, this can produce frustration and occasional acrimony from various quarters.

A Review of the ICANN governance model

The mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

In some simple administrative sense this mission reduces to three parts: (a) a property registry of ownership (URLs); (b) a property survey (IP addresses) to allow property to be located; and (c) the technical task of making sure that the URL registries and IP address servers operate properly and efficiently.

ICANN experiences more complexity and difficulties than these simple tasks suggest because: (a) the supply of properties is not finite and can be expanded by ICANN, and (b) URL property ownership may be complicated by property ownership rights in other domains (e.g. copyrights or patents legally protected under existing intellectual property laws). In short ICANN has legislative and judiciary obligations which It attempts to carry out without being accountable to any external body, and where there is extreme pressure from the vested interests of various stakeholders.

To tease this dilemma to the surface, let us first look at what ICANN lists as a set of "core values" that guide the Board's (ICANN's) decisions and actions. That list is given as:

- Preserving and enhancing the operational stability, reliability, security and global interoperability of the Internet.
- Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
- To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
- Seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision-making.

- Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
- Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
- Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
- Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
- While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

There is a subtle difference between values and principles and it is useful to argue that this list is more about different ICANN operational principles than it is directly about ICANN values.

Principles are frequently thought of as rules (or laws) to be generally applied in a given setting. Here that is ICANN's role to govern the internet. For an organization such principles address organizational behavior and provide a basis for decision making, including interacting (consultative dialogue, negotiations, etc.) with others.

Values on the other hand have a more subjective basis, involving good and bad, or right and wrong. For an organization they are about how it should carry on its business, both as that impacts on others (caring or not caring) and with (or without) consultation with others. Some values may be general such as honesty and integrity. Some are preferential, like preferring market solutions to solutions by other means. Others balance the interests of the individual (person, corporation, country) against those of the community (civil society, the private sector or the global community).

The list that ICANN refers to as its "core values" to govern ICANN governance reflects principles that can be grouped into several categories, some are simple and some more complex.

1. Technical Objectives:
 - a. Preserving and enhancing the operational stability, reliability, security and global interoperability of the Internet.
 - b. Acting with a speed that is responsive to the needs of the Internet
2. Governance Principles:
 - a. Limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

- b. Delegating coordination functions to, or recognizing the policy role of, other responsible entities that reflect the interests of affected parties.
- c. Seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision-making.
- d. Employing open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.
- e. Ensure that those entities most affected can assist in the policy development process.
- f. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
- g. As part of the decision-making process, obtaining informed input from those entities most affected.
- h. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness
- i. : Recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations

3. Market Preference (Values):

- a. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
- b. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

Category 1, Technical Objectives needs little comment other than to observe that it depends heavily on volunteer support and, as economists are fond of saying, “there is no free lunch” and the issue of resources to maintain the required components of the technical infrastructure may well surface at some time.

Category 3, Market Preferences, as an ICANN value likewise needs little comment other than to note that many aspects of the Internet have the properties of what economists call a “public good”, or in this case a “public service”, in which case externality benefits mean that rationing access to major aspects of the Internet purely by market prices would be a mistake, even at competitive market prices.

Category 2, Governance Principles, is where the hammer hits the anvil in terms of complications looming larger with the passage of time. ICANN does more than administer an orderly naming of space (properties) through domain names. It also has the legislative power to expand that space, and through its intermediaries the ability to assign ownership in ways that can lend themselves to contested ownership. Contested ownership is adjudicated at present in some cases by the Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a process established by ICANN.). Some country code top-level domains are adjudicated elsewhere.

There are two challenges here. One is that ICANN has both legislative and judicial responsibility and is accountable only to itself. This is not to suggest that ICANN might be irresponsible, but it is to suggest that external accountability is essential to the integrity of both the legislative and judicial processes. Also, they should not be administered by the same entity. The other challenge has to do with the complex nature

of contested ownership in a globalized world made up of sovereign states, national and global business interests, and various levels of non-governmental organizations presenting and defending the interests of civil society, usually in the name of social justice.

In the face of these challenges it is useful, albeit a detour, to look at the governance structure of the International Labour Organization, a long standing sister organization of the United Nations whose existence predates the United Nations. The “detour” will shed some light on the proposals coming from Brazil, India and South Africa as noted above.

The International Labour Organization Governance Model < <http://www.ilo.org> >

The organizational structure of the International Labour Office presents itself as an interesting and viable model for a tripartite organizational governance process. Elements of the ILO model might recommend themselves to future governance models for ICANN, but with major shortcomings that have to do with challenges internal to ICANN itself.

The ILO was founded in 1919, after World War I, to pursue a vision based on the premise that universal lasting peace can be established only if it is based on social justice. The ILO became the first specialized agency of the UN in 1946 and is responsible for drawing up and overseeing international labour standards in the pursuit of Decent Work.

It is the only 'tripartite' United Nations agency that brings together representatives of (a) governments, (b) employers and (c) workers to jointly shape policies and programmes promoting Decent Work for all. It has no legislative power, no judicial power and pursues its mission through tripartite social dialogue, relying on cooperation between governments and employers' and workers' organizations in fostering social and economic progress, in particular with reference to “Decent Work”.

Within the structure of the ILO workers and employers together have an equal voice with governments to ensure that the views of the social partners are closely reflected in ILO labour standards, policies and programmes, all of which can be thought of as “best practices” for member states. This same tripartite dialogue is fostered within member States, as a backdrop to formulating and implementing national social policy.

The ILO accomplishes its work through three main bodies, (1) The International labour Conference, (2) the Governing body and (3) the Office, all aided by tripartite committees which comprise governments', employers' and workers' representatives, and assisted by committees of experts.

A quick review of the publications of the ILO, including the International Labour Review, reveals that the ILO does not shy away from challenging labour issues, either at the global, the regional, or the national level. Similar to other UN and related sister agencies it can support knowledge diffusion and dialogue but it has neither the power to legislate nor adjudicate.

While the ILO model presents itself as a possible model for a more formal tripartite consultative social dialogue within ICANN, it does not offer a model for how ICANN “legislates” the domain names process, how ICANN “adjudicates” domain name disputes

at arm's length from the legislation process, nor how ICANN can be made accountable, and to whom. The ILO model also, of course, does not settle who, other than the nation state, has ultimate responsibility for how such matters are handled in specific instances.

Stakeholders and where do things go from here?

Returning to ICANN's existing governance structure it is probably accurate to say that it is less a formal governance structure than a relatively ad hoc administrative structure, albeit well built to handle many of the stresses and strains during the Internet's rapid period of growth. However, it is the very success of the Internet that threatens the adequacy of the current structures.

Within these structures resides the ICANN multi-stakeholder model. Only brief note is taken of the MSM here, not because stakeholders are not important, but because the model is probably hopelessly flawed within the existing ICANN governance model.

Not surprisingly, the multi-stakeholder model is subject to ongoing criticism. Since ICANN has no formal outside accountability there is scope for endless dispute over the adequacy of representation, and the effectiveness of participation, in the affairs of ICANN. As well, since there is no really formal governance model here, there is always latitude for criticisms based on "mission creep", efforts by stakeholder groups to expand the scope of the ICANN mandate to greater inclusion, both with regard to stakeholders and Internet related issues, as well as efforts by stakeholder groups to contract the scope of the ICANN mandate.

Consider the stakeholders. On the one hand, while governments defend their national sovereignty, they are busy at work constructing binding regional and global trading agreements that go well beyond the World Trade Organization (WTO) framework's original focus on commodities, through to the WTO administered Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Various regional agreements go further, acting as "Trojan Horses" for more contentious agreements with regard to intellectual property and services. However, unlike, for example, ICANN's, dispute resolution mechanisms, such agreements are legislated into law, and come with enforcement mechanisms, especially with regard to intellectual property rights (patents, copyrights,....*and domain names*).

Consider private sector participation in this process, mainly in the form of registry, registrar and commercial stakeholder groups. Being both national and global, and accountable mainly to themselves, they operate within the context of national laws and international agreements. They tend to operate within the multi-sector process when it is their advantage, either to support or oppose ICANN's direction of change. They tend to operate on other stages (national, WTO, TRIPS) when it is to their advantage. It is hard to avoid the conclusion that ICANN, as currently constituted, will be increasingly marginalized, or subjugated, by the globalized interests of commercial stakeholders.

Consider civil society participation in this process. The first problem for civil society actors (ngo's, etc.) is quite clear. They are the weak first cousins in the multi-stakeholder model of participation. Like poorer countries, they do not have the resources to participate in the multi-stakeholder model at the level of, in particular, the private sector.

As well, since civil society actors are frequently at odds with governments in their pursuit of social justice issues, they have neither the resources nor the political clout to partner with sovereign states in an ICANN multi-stakeholder process.

This dilemma poses a real challenge to civil society actors with respect to the future of the Internet and its role in –broadly put- the pursuit of social justice. Should they press for reforms within, reforms that give civil society a greater voice in the ICANN mission dialogue (much like the tripartite ILO model). Or, should they acknowledge that the ICANN governance model is seriously flawed, less by design and more by its necessary historical path, and seek progress by other means.

Conclusion: Where do things go from here?

As one for whom the phrase “global government” sends chills down my spine, I would not be a supporter of a three BRICS (Brazil, India, South Africa) proposal for a UN agency, if that had binding legislative and judicial power. I would support one that operated along the lines of the ILO, where it served as a forum for tripartite reasoned dialogue, research, and knowledge networking and dissemination. However, that would presuppose that legislative and judicial authority resided elsewhere.

In the case of the ILO legislative and judicial authority rest with sovereign nations. I note the substantial resistance of civil society organizations to any solution that vests nation states with exclusive control over the Internet within their borders, although I do not rule that out as an eventual solution. Besides, any solution to Internet governance that is not accompanied with strengthening what I would call the social justice role of sovereign states would be a hollow solution, as least for those under regimes not committed to social justice.

As a speculative observation, even if some aspects of global government came to pass (*hopefully not in the guise of over-reaching commercially driven “trade agreements”*) it is not at all clear that Internet governance is the right place to start.

How do I sum this up? As stated from the start, these are the observations of an outsider. At the start I held high hopes for something like the ILO’s tripartite model but now realize that it has value for reasoned dialogue among the multiple stakeholder groups, it does not carry the weight of a governance model for the Internet. ICANN is between a rock and a hard spot (or hanging on to the tail of the Internet tiger) on two sets of issues.

The key one is to whom is it accountable, and if not ICANN what will be accountable to whom in the governance of the Internet.

The other is that so long as it has no real accountability (to whom?) it will continue doing a relatively admirable administrative job of coordinating the efforts of those who support the domain name servers, IP databases, etc. while it has to muddle through with “internet legislation” (domain names creation) and “internet adjudication” (domain name conflicts). At the same time national (sovereign) stakeholders and global (commercial) stakeholders will exert more muscle with regard to Internet matters of interest to them. They will likely do so increasingly outside the multi-stakeholder model and, probably, outside of ICANN itself.

Postscript: The winds that blow

It would have been presumptuous on my part to think that an outsider's view would produce grand insights into ICANN's governance model, or provide guaranteed fodder to feed's civil society's legitimate quest for a greater say in the governance of the Internet.

My intent here is much more modest. I have drawn a rake through what I understand to be some central aspects of the challenges to the governance of the Internet and how those challenges confront both ICANN in its current incarnation, and ICANN's overly (and always) marginalized civil society actors.

If I have one parting piece of advice, it is that there is immense capacity in the Internet to support organizational structures and social processes for the pursuit of global social justice. A crucial element of social justice is a just and fair sovereign state. As civil society groups put pressure on ICANN to better reflect their social justice aims, they should not neglect the other task, working with/via the Internet to build that just and fair sovereign state.

While an ILO model does not solve the wider Internet governance issues, an ICANN (or post-ICANN) ILO-style entity could help build a "Decent Internet for all" much as the ILO works to build a world with "Decent Work for all". We are not there yet, but we can get closer.

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