

AN INDEPENDENT ICANN?

TAKE TIME TO PREPARE SAFETY NETS BEFORE TAKING THAT LEAP\*

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What makes the Internet so remarkable is that it links many different communication networks in one global system. Different network operators build and operate their own networks. But to link these networks, there must be an agreed system for indicating the identifying “names” and electronic “addresses” of each site. What ensures such conformity is a relatively obscure non-profit corporation based in California, the Internet Corporation for Assigned Names and Numbers – ICANN. ICANN controls the so-called “root” of the naming hierarchy, the authority to designate the managers and operators of the top-level domains, like “.com” or “.net” or “.uk,” to ensure that they can communicate with all other networks on the system.

Since its founding in 1998, ICANN has operated under an agreement with the U.S. Department of Commerce. The latest agreement is due to expire on September 30, 2009.

Many advocates have urged that the U.S. government relinquish any remaining responsibility for control over ICANN. The Internet, after all, is now a truly international phenomenon. Why should it remain specially accountable to the U.S. government?

That is a fair question. It may be that better alternatives can be devised. They are certainly worth thinking about. But it would be wise to think carefully about the implications of different arrangements beforehand – rather than

simply cutting ICANN loose from any governmental ties and hoping for the best. This paper is, above all, a plea for caution. No one can see clearly how the Internet will operate even a decade from now. That is good reason to proceed cautiously rather than take a leap in the dark.

### Why It's Hard to Think Clearly About ICANN

There are two main reasons why it is hard now to think about governing arrangements for ICANN. The first is that it has an ambiguous history. The second and more important reason is that it has a quite unique character.

Regarding its history, there is no dispute that the Internet grew out of projects financed by the U.S. government, most notably the ARPA-net developed in the 1980s for communications within the U.S. military. But there is also no doubt that, as the system expanded – with such technologies as e-mail – the government was content to leave practical responsibilities to software engineers who were not actual government employees but affiliates of university research institutes or start-up firms, working on government contracts. It was not due to government plan but the foresight – or perhaps the fortuitous decision – of outside specialists that the Internet (or what became the Internet) developed as it did.

The system developed, in other words, under government patronage but under the immediate control of a circle of specialists accustomed to coordinating their efforts through informal consultations among fellow specialists. The Internet Society, founded in 1991, sought to establish a public forum for Internet policy deliberation – and it was entirely private. By 1998, when the organizers of the Internet Society sought to claim fully independent authority to lay down rules for access to the Internet, the U.S. government resisted.

ICANN was the compromise – a private entity operating under a “Joint Project Agreement” with the Department of Commerce. The government acknowledged as recently as 2005 that this improvised relationship was not meant to be permanent and indicated that ICANN might in the relatively near future be established as a fully independent entity. Then the government seemed to have second thoughts. Now the question is up for renewed discussion – as the 2006 Memorandum of Understanding is due to expire.

But it is hard to envision ICANN as merely a private corporation. It does not simply provide a service to those who care to use to it. It has, in effect, a choke–hold on access to the entire Internet: only names and addresses recognized by ICANN (or conforming to ICANN standards) can participate and most companies or institutions operating “top–level domain registries” (grouping sites with a common suffix like “.com” or “.edu”) operate

under contract with ICANN and could not operate otherwise. Milton Mueller, in the most comprehensive book on the governance of the Internet, sums up ICANN's status this way: "It has monopoly control of an essential resource."

Though ICANN officers frequently claim to make decisions based on "bottom up consensus" of the "community" of Internet participants, Mueller explains why ICANN decision-making can't have the same detachment as the deliberations of software engineers in the Internet Engineering Task Force. It is plausible to think that software engineers will reach "rough consensus" about standards for new applications. It is less plausible to think this way about the rules that allocate site names worth millions of dollars in a multi-billion dollar industry. "The underlying subject of ICANN policies is the distribution of wealth among various industry players and consumers. Thus, if any actor or coalition of actors can gain more influence over the process and exploit it to gain a larger share of the pie, they will do so. ICANN's domain name policies are driven by power politics and economic conflicts of interest, not consensus."<sup>1</sup>

Mueller says ICANN should be viewed as "a global regulatory regime." But if so, it is quite unique among international institutions in not resting on an actual international treaty. A more recent study, by legal scholars Jack

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<sup>1</sup> Milton L. Mueller, *Ruling the Root, Internet Governance and the Taming of Cyberspace* (MIT Press, 2004), p 216

Goldsmith and Tim Wu, describes it as the outcome of “the U.S. government brokering a behind-the-scenes deal that best suited its policy preferences.”<sup>2</sup>

The question is – if you remove the United States government, does ICANN go along as before but now simply on its own? Is it really likely that everyone with a stake in Internet policies would leave ICANN alone because it could then claim to be “independent”?

### An Independent Entity is a Vulnerable Entity

People often say “it’s a jungle out there” – and they’re just talking about the business world. Governments claim a lot authority to protect people from commercial predators. Would governments leave ICANN alone because it claims not to be a business? It would still be an independent entity – that is, not accountable to any government.

The first thing to notice is that, whatever else one says about it, ICANN looks like a monopoly. Over the past twenty years, the European Commission has developed a quite energetic regulatory reach in the name of breaking up monopolies or potential monopolies. As it happens, the European Commission has launched quite aggressive antitrust actions against Microsoft and Intel and

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<sup>2</sup> Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, 2006), p. 169

other American firms in the computer industry.<sup>3</sup> Would it be more respectful of ICANN because it is smaller? Its current revenues exceed \$60 million a year, so it is not exactly “judgment proof” in the sense of being unable to pay any damage award. The fact that ICANN claims to be a non-profit organization might be less relevant than the fact that it does, in fact, wield monopolistic control over a hugely valuable resource – access to the Internet.

The danger, of course, is not that ICANN will have to pay fines but that it will be tempted – or coerced – into making concessions to satisfy EU priorities. Perhaps its monopolistic powers would be more acceptable if it agreed to have a certain number of directors appointed by the EU? Perhaps it would be more acceptable if it were more cooperative with EU efforts to tax commercial sales negotiated over the Internet? Perhaps there could be a new understanding about upholding EU privacy directives when governments – such as the U.S. government – seek cooperation in tracking or closing down Internet sites used by terrorists or criminals?

Meanwhile, the United States may have its own second thoughts. Two years after ICANN was established, when there was still much talk about the initial arrangements as merely “interim,” the General Accounting Office, the

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<sup>3</sup> Of the top five largest fines ever leveled by the European Commission for antitrust abuses, three were against American computer companies. But the Commission also claims the right to demand changes in corporate practice – as, for example, demanding that Microsoft bundle different Internet browsers in its Windows software. See Charles Forelle, “EU Plans Fresh Strike on Microsoft,” *The Wall Street Journal*, May 30, 2009 (p. 1)

watchdog agency for Congress, issued a report questioning whether it would actually be lawful for the Commerce Department to cut its ties with ICANN: such an action might constitute “transfer of government property to a private entity” – something which, under the U.S. Constitution, must have congressional approval.<sup>4</sup>

The issue has remained dormant in the years since, but might easily be rekindled if there is some public controversy over an ICANN decision. Must ICANN cooperate with U.S. government security investigations? Should it, instead, honor counter–pressures from others? Even if the Commerce Department negotiates an agreement that seems to cede complete independence to ICANN, Congress might subsequently reconsider the matter. It might even propose legislation premised on the claim that any decision of the Commerce Department in 2009 was unlawful and therefore void.

What would ICANN do in the face of such a threat? Presumably, if it is truly independent it can try to shield itself from legal claims by relocating its home office and many of its assets to another location. In fact, when the leaders of the Internet Society first tried to establish its independent regulatory authority, they proposed to base their new organization in Switzerland. There is no obvious reason why they could not relocate to Barbados or Antigua or

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<sup>4</sup> General Accounting Office Report, “Relationship With the Internet Corporation for Assigned Names and Numbers” (2000), summarized ed in Mueller, *Ruling the Root* at p. 197.

some other well-established tax haven, where a friendly government might try to shield their books from the prying eyes of U.S. or EU investigators.

Governments do, of course, have ways of reaching actions outside their borders and pressuring other governments to cooperate. The U.S. has already successfully imposed shut-downs of websites offering on-line gambling from off-shore bases. The point is simply that an “independent” ICANN will still be subject to a great many indirect pressures.

One way of warding off such pressures would be to mobilize supporters – or to put it a bit more crassly, to buy support. As it is, ICANN talks about trying to make decisions by “rough consensus” of “stakeholders” in the Internet community. “Rough consensus” is, of course, a very slippery term: it might mean that there is no one protesting so loudly that the policy seems “contentious” or “controversial” rather than “roughly consensual.” That means those with the capacity to make noise have the capacity to press for accommodations in return for the promise to mute their protests and leave things looking “roughly consensual.” So there will be significant incentive for many new “stakeholders” to mobilize – or in other words, develop the capacity to make noise.

Who are the “stakeholders” when it comes to ICANN policy? If they include users of Internet services, they might be anyone. In domestic regulatory settings, advocates claiming to represent “racial minorities” or

“environmentalists” or “concerned citizens” have often protested zoning variants or proposed licensing agreements or antitrust merger clearances – until “accommodated” by business concerns (often with direct cash contributions to some designated charitable concern linked to the protesters). Would an independent ICANN be independent of such pressures?

The ultimate stake in such confrontations would be ICANN’s ability to remain even nominally independent. If it is surrounded by controversy, perhaps it would be best to place it under some regulatory umbrella, to shield it from critics? But it is easier to demand “accountability” than to agree on an acceptable structure.

### Unsettled and Unsettling Alternatives

The most obvious alternative to U.S. government sponsorship of ICANN would be some international consortium of major powers – or major Internet powers. There have been proposals, for example, to have a group of 12 states – a “G-12” – supervise ICANN.

But it would be very difficult to limit participation – or voting rights – to twelve or some other discreet number of countries. The Internet is available in almost every country, so why shouldn't every country have a say in how it is governed? ICANN has an incentive to seek some formal affiliation from small countries, since operators of country domains (“uk” in Britain, “au” in Australia, “de” in Deutschland -- that is, Germany, etc.) received their operating authority before ICANN was established and their status (including their precise obligations to ICANN) remains ambiguous.

But the larger point is that international institutions have trouble excluding members and they have trouble avoiding one-country/one-vote governing arrangements. The club of major industrial nations started as the G-7 in the 1970s. At its most recent gathering in London in the spring of 2009 it had blossomed (with Russia, China, India, Brazil and many other new participants) into the G-20. And the G-20 is merely a consultative body with no formal authority.

In 2005, the UN Human Rights Commission had become so politicized and discredited that UN Secretary General Kofi Anan urged reforms that would at least exclude the most repressive countries from participating in its deliberations. After a year of negotiation, the UN ended up with a new, reformed Human Rights Council – including such paragons of human rights as Russia, China, Saudi Arabia and Cuba.

The lesson of past experience is quite clear: If there is some chance to exercise power and influence, every country has an incentive to demand the right to participate – if for no other reason than to trade votes for favors in other areas. International organizations find it hard to exclude applicants for admission. No one even tried to exclude land-locked states from participating in international conferences on the law of the sea.

One way of avoiding one-country/one-vote arrangements is to make voting strength proportional to contributions, as at the World Bank and the International Monetary Fund. Even when such differential voting power is not formally established, larger donors may wield disproportionate influence by threatening to withhold dues or contributions when not satisfied. Such measures would be hard to establish for an international Internet authority, however. ICANN does not depend on annual contributions from governments. It generates revenue from non-governmental sources by charging fees for the right to use its domain names. So restricting voting rights of smaller or poorer nations would be taken as a blatant reflection on their status in the international community – where all nations are supposed to be equal.

Perhaps the difficulty could be assuaged by having some directors of ICANN elected by Internet users. ICANN officials once proposed such a scheme. But we don't know whether such elections would turn on actual user interest or the capacities (or determinations) of particular governments to

mobilize their voters. If China, for example, can organize the election on its own, there may be more Chinese directors than anyone had expected. Who would be in a position to assess charges of voter fraud against the Chinese government?

So we may well see an organization that is paralyzed by disputes among participating nations. That is, according to many observers, what has happened to the International Telecommunication Union.<sup>5</sup> In the 1980s, deregulatory initiatives in major western countries (for telephone services) bypassed ITU regulations. Ever since, disagreements between western and less developed countries have made it hard for the ITU to find a new role. If it is asked to take responsibility for ICANN, the ITU may turn out to be a spectator to decisions actually made by ICANN on its own – if the ITU’s role is limited to blocking measures. If a new system required ICANN to get ITU approval before changing any policy, we would likely end up with a lot of policy stagnation – or a lot of serious policy matters restyled as mere technical questions for administrative resolution outside the ITU, anyway.

Some advocates have proposed that ICANN be made accountable with some system for specialized dispute resolution. AT&T, for example, has

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<sup>5</sup> A useful overview is provided by Don MacLean, “Sovereign Right and the Dynamics of Power in the ITU,” in William Drake and Ernest Wilson, *Governing Electronic Networks* (MIT Press, 2008), concluding that if steps are not taken to “radically reform the ITU’s organizational structure ... the ITU will have no option but to continue its descent, in an ever-tightening spiral.” (p. 116)

proposed a system in which new ICANN regulations might be challenged before “an independent judiciary” established to enforce a constraining legal charter for ICANN.<sup>6</sup> Such proposals don’t so much solve the political problem as displace it. Who would appoint these judges? Who would determine if they should be re-appointed or replaced?

Judges at the International Court of Justice often seem to decide cases based on the preferences of their home governments. The United States has been so dissatisfied with the results that it has refused since the mid-1980s to submit to the ICJ’s jurisdiction, except in special cases. There has been more satisfaction with arbitration panels organized under the North American Free Trade Agreement and the World Trade Organization. But arbitrators here are chosen from rosters of legal practitioners or legal scholars with recognized expertise in trade law. Since most countries have been engaged in international trade negotiations (and enforcement) for many decades, there are many, many experts of this sort in countries around the world. How many recognized experts are there in the arcana of Internet naming and numbering policy?

### Stop-gaps and the Appeal of the Second-best

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<sup>6</sup> “AT&T Comments in Response to ICANN Consultation on the ‘Draft Implementation Plan,’” May 11, 2009 (at p. 10)

After looking at the difficulties in establishing better arrangements, we ought to remember that defective institutional arrangements often prove remarkably enduring. Countries that don't like the status quo often still find it easier to accept than the most available or likely alternatives.

To take the most famous example, the UN Security Council gives a veto over resolutions to each of its permanent members. They are the great powers – or rather, the great powers as of 1945, when the UN Charter was negotiated. Today it is very hard to justify giving a veto to France or Britain but not to Germany or Japan – or Brazil or India or Indonesia. And there have been periodic efforts to reform the system since the end of the Cold War. But every reform proposal has been defeated by blocking coalitions from different corners of the UN membership. Britain and France endorsed the Japanese claim for a permanent seat if Germany was to have one, but China was strongly opposed to a Japanese seat and Pakistan happy to join China on this point if China endorsed its opposition to an Indian seat and Latin American nations would not support a Brazilian seat unless matched by a seat for a Spanish-speaking nation – and Latin nations could not agree on which one it should be. Each reform effort generated new obstacles and new objections. After decades of negotiation, we are still where we started.

Many countries, particularly EU countries, say it is not acceptable for the United States to have dominant say over the governance of the Internet. That

does not mean they would prefer a free-for-all in which dominant say migrated to China and its allies or to some broad coalition of less-developed nations, quite prepared to block Internet expansion unless some portion of cyber-commerce revenue were set aside for “development assistance.”

In just this way, American predominance has often proved more acceptable than the most available alternatives. France withdrew from the NATO military command structure in late 1960s in order to force the United States to share more of its leadership role in the organization. But no other NATO member followed France. Others worried that French leadership would prove unreliable or fail to secure previous levels of American commitment. France itself ultimately returned to an enlarged NATO command structure – but one as much under American leadership as before.

Today there are protests against the Global Positioning System, operating through a satellite network that is entirely under U.S. control. Europeans have talked about launching a rival system under EU control. But EU members fear that will prove to be a prohibitively expensive effort. There has not been a strong push for international control. Even within the EU, not many countries prefer a system answering to China and Russia or some unstable coalition of less developed countries.

None of this means an ICANN tied to the Commerce Department is the best the world can ever expect. But we should not think a new consensus will

magically appear simply by the withdrawal of American sponsorship. If it takes years to work out a new agreement with broader international participation, the system is in no danger of breaking down in the meanwhile. ICANN has a great deal of operating independence, but the background presence of the U.S. government – which can threaten to reconsider the existing “partnership” agreement -- seems to exert some degree of salutary caution on ICANN initiatives.

Allowing time for further debate on ICANN’s future does not pose any real threat that current arrangements will be frozen in place and preclude more comprehensive reforms in the future. The General Agreement on Tariffs and Trade (GATT) was adopted as an “interim measure” in 1947, after the collapse of efforts to establish a more ambitious treaty system under a proposed International Trade Organization. As it turned out, the GATT lasted 38 years but was finally superseded by the World Trade Organization in 1995.

With a vastly enlarged membership by the early 1990s (it had started with only 23 participating nations), GATT did give way to a far more elaborate international structure in the end. One reason the GATT lasted so long was that, despite many objections and deficiencies, it was adaptable – and it performed a vital service, not least in reassuring members that there was a system of rules in place, even if less comprehensive and reliable than some might have liked.

ICANN's American sponsorship offends some countries. But it may also be reassuring – even to many of the same countries that resent the appearance of American domination. The background role of the U.S. government should not be withdrawn before the world has a chance to consider what alternatives are really available in the current state of world politics. We may find better alternatives in the future. But they are only likely to be better if the world takes some time to think them through.