

ARTICLE 19

ICANN Reform: Recommendations

March 2014

Policy Brief

Executive summary

On 23-24 April 2014, the Global Multistakeholder Meeting on the Future of Internet Governance (NETmundial 2014) will meet in Brazil to discuss a roadmap for the further evolution of the governance ecosystem. This policy document deals with the place of the Internet Corporation for Assigned Names and Numbers (ICANN) in this ecosystem.

Whilst ICANN has indicated on several occasions that it solely focuses on the technical administration of the Domain Name System (DNS) and the coordination of the IP address space, it is simply impossible to ignore the broader public policy dimensions of its work. This includes, among other things, intellectual property, competition and taxation policy. In particular, ICANN defines and enforces intellectual property rules regarding rights in domain names, which inevitably has a highly significant impact on the ability of internet users to access information and therefore, the meaningful exercise of the right to freedom of expression.

Over the years, however, several concerns have been raised about ICANN's legitimacy in taking policy decisions in certain areas due to its corporate governance arrangements, in particular:

- The lack of independence from the US government as regards the IANA function;
- The lack of representation of developing countries within ICANN;
- The disproportionate influence of the Government Advisory Committee (GAC);
- The lack of accountability of the Board.

In this policy document, ARTICLE 19 in consultation with civil society organisation and other stakeholders involved in internet governance discussions offers some recommendations with a view to improving ICANN's current governance structure and accountability, as well strengthening the protection of human rights within ICANN.

We believe that reform of ICANN is inevitable if it is to fulfil its promise as a truly global multi-stakeholder organisation. In order to succeed, we believe that any reform of ICANN should be guided by the following principles:

- Multi-stakeholder, not multilateral
- Human Rights, in particular the rights to free expression, privacy and due process.
- Transparency & Accountability
- Inclusiveness & Diversity

We support globalization of ICANN and the IANA functions. However this process must take place in a way that guarantees ICANN's independence from undue government interference. In this policy document, we also make specific recommendations to ensure that the Government Advisory Committee becomes a more inclusive, transparent and accountable body. We further propose mechanisms to strengthen the accountability of ICANN's Board of Directors.

We hope that this proposal will prove valuable for the safeguard of the multi-stakeholder

model of Internet Governance and will inform discussions at Net Mundial and beyond.

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Introduction

On 23-24 April 2014, the Global Multi-stakeholder Meeting on the Future of Internet Governance (Net Mundial) will meet in Brazil to discuss a roadmap for the further evolution of the governance ecosystem.

One of most anticipated discussions is the place of the Internet Corporation for Assigned Names and Numbers (ICANN) in this ecosystem.

Whilst ICANN has indicated on several occasions that it solely focuses on the technical administration of the Domain Name System (DNS) and the coordination of the IP address space, it is simply impossible to ignore the broader public policy dimensions of its work. This includes, among other things, intellectual property, competition and taxation policy. In particular, ICANN defines and enforces intellectual property rules regarding rights in domain names, which inevitably has a highly significant impact on the ability of internet users to access information and therefore, the meaningful exercise of the right to freedom of expression. Over the years, however, several concerns have been raised about ICANN's legitimacy in taking policy decisions in certain areas due to its corporate governance arrangements.

In this policy document, ARTICLE 19 - together with a wide range of civil society organisations and individuals¹ - examines ICANN's governance model. Our assessment draws on our knowledge of human rights standards as well as longstanding experience in transparency, accountability and Internet Governance work. The structure of the document is as follows:

- First, we list the key concerns associated with ICANN;
- Second, we critically assesses some ICANN reform proposals;
- Third, we offer some recommendations with a view to improving ICANN's current governance structure and accountability, as well strengthening the protection of the right to freedom of expression within ICANN.

ARTICLE 19 hopes that this proposal will prove valuable for the safeguard of the multi-stakeholder model of Internet Governance and will inform discussions at Net Mundial.

¹ A first round of consultation was held with individuals and organisations from the Best Bits civil society network who met at an internet governance meeting on 19 December 2014, including members from ARTICLE 19, Access, Centre for Democracy and Technology (CDT), Centre for Technology and Society, Global Partners Digital and the Internet Democracy Project. The policy was subsequently shared on the Best Bits and 1Net mailing lists for comments. In particular we shared the document with Avri Doria, Bertrand de La Chapelle, Desiree Milhosevic, Jeremy Malcolm, Milton Mueller, Olivier Crepin-Leblond, Pranesh Prakash and William Drake among others. We are grateful for comments received from Matthew Shears from the Centre for Democracy and Technology (CDT), Deborah Brown from Access, Dixie Hawtin from Global Partners Digital, Milton Mueller and Brenden Kuerbis from the Internet Governance Project (IGP), as well as Hans de Zwart from Bits of Freedom.

ICANN's current model of governance: the issues

Lack of independence from the United States government

There is a difference of views as to how well ICANN works as a multi-stakeholder organisation. According to the founding documents of ICANN, it is organised 'in a bottom up, consensus driven, democratic manner'. Perhaps one of the most common complaints levelled against the current ICANN arrangements, however, is the organisation's lack of independence from the United States Government (USG). And indeed, ICANN received its initial mandate from the National Telecommunications and Information Administration (NTIA), an agency of the US Department of Commerce (DOC).

As of now, the relationship between the US DOC and ICANN is chiefly governed by the following agreements:

- The [Affirmation of Commitments](#) (AOC), which requires ICANN to be wholly-owned, incorporated and operated within the United States;
- the [IANA contract](#), whereby management and implementation of the IANA functions are awarded to ICANN by the USG;
- In addition, under a [Cooperative Agreement](#) with the NTIA, the US company VeriSign is tasked with the management of the authoritative root zone file. According to the NTIA website, VeriSign's responsibilities include editing the file to reflect "recommended" changes, publishing the file and then distributing the file to the root server operators.

As far as the IANA contract is concerned, key areas of controversy include:

- Under the IANA contract, the US government authorizes changes made to the root zone by verifying that ICANN abides by publicly documented policies prior to the changes being submitted for implementation.
- The contractor providing the IANA function must be a US organization, so that the provision of the IANA function is effectively subject to US law and the decisions of the US courts.

In short, the fact that the US government has the power to make unilateral changes to the DNS root and that ICANN is required to have its headquarters in the US under current contractual arrangements have long been a source of intense criticism. In particular, concerns have been raised that the IANA contract is too exclusive and ultimately requires the rest of the world to trust that the USG 'will do the right thing'. For this reason, some have suggested that the IANA function should be entrusted to several international organisations (see II. further below).

Nonetheless, there are reasons to believe that the lack of independence from the USG may be more a problem of perception than in reality. In particular, some have argued that even if the USG were to remove the country-top level domain (ccTLD) of a specific country from the root

zone, this could be corrected by root server operators outside the US. Alternatively, the problem could be avoided by using another domain (like .com or .net). It is also highly unlikely that this power could be used more than once lest the USG would lose all credibility as a harbour for a free, open and accessible internet.

Moreover, the USG has not been deaf to criticism. ICANN has become more independent from the USG over the years, culminating with the AOC. Most recently, on 23 January 2014, Ambassador Daniel A. Sepulveda, U.S. Coordinator for International Communications and Information Policy, cautiously encouraged IANA reform in a speech about Internet Governance in Washington. This has already been interpreted in some quarters as an indication that the USG is prepared to consider an even greater level of independence of ICANN and work collaboratively towards its globalisation as originally envisioned in ICANN's founding documents. At the same time, it is worth remembering that the USG is in a particularly strong negotiating position since any unilateral decision of ICANN to, for instance, move its headquarters outside the USG, would amount to a breach of contract.

Undue influence of the Government Advisory Committee

Over time, governments have gained increasing powers and influence within ICANN through the Government Advisory Committee (GAC).² In particular, unlike other advisory committees of ICANN, the GAC has the following powers and privileges:

- The unilateral power to put an item on the agenda of the Board;³
- The Board is required to take GAC's advice into account;⁴
- In the event of a conflict between the GAC and the Board, the ICANN bylaws mandate negotiation towards mutual resolution;⁵
- The GAC has effectively the right to participate in Board meetings since, unlike the other advisory committees, its non-voting liaison to the Board cannot be removed by the Board;⁶
- The GAC can appoint non-voting liaisons to the various supporting organisations councils and advisory committees, including the [Generic Names Supporting Organization](#) (GNSO).⁷ Conversely, GAC meetings are in principle not open to other supporting organisations.⁸
- Unlike other supporting organisations, the GAC enjoys a certain independence from the Board since it is not subject to review or reporting requirements.⁹

Given that multi-stakeholderism is premised on the equal say of the stakeholders involved in decision-making, several Internet Governance actors have asked the question whether the mere existence of the GAC could be a violation of the multi-stakeholder nature of ICANN. It

² See for instance, [Wolfgang Kleinwächter, Is ICANN Stumbling Forward? GAC Advice and Shared Decision-Making Procedures, CircleID, 24 October 2012.](#)

³ Section 2.1 (i) of ICANN bylaws.

⁴ Section 2.1 (j) of ICANN bylaws.

⁵ Ibid.

⁶ See section 11.2 of ICANN bylaws.

⁷ Section 2.1 (g) of ICANN bylaws.

⁸ See Articles 4 and 5 of the GAC Operating Principles.

⁹ See <http://www.icann.org/en/about/governance/guidelines>

has also been said that the GAC undermines the functioning and credibility of other ICANN bodies and processes since the exceptional status of the GAC tends to encourage people and groups to lobby the GAC directly in order to get faster access to the Board. Finally, the GAC has been criticised for the lack of transparency of its working methods. In particular, GAC meetings are ordinarily held in private and only official announcements are published.¹⁰ Moreover, GAC meetings are all but closed to other stakeholders since GAC membership is open only to governments and observers are typically drawn from intergovernmental organisations.¹¹ This, in turn, breeds both mistrust and misunderstanding as to what the GAC seeks to achieve.

At the same time, the Internet touches on so many different aspects of everyday life, from health, education to economics and politics that it would be naive to expect governments to sit back. Moreover, it is important to remember that under international human rights law, governments are required to guarantee the protection of human rights online. In practice, this means the adoption of laws and policies that respect and protect human rights such as the right to privacy and freedom of expression. The role of governments in Internet Governance cannot, therefore, be easily dismissed.

The question therefore becomes how governments can usefully participate in transnational organisations such as ICANN. In this regard, the Internet's promise is that transnational institutions have been capable of managing internet technical standards and infrastructure without governments having the final say, including on transnational policy matters. One of the downsides of multilateral processes, i.e. driven by governments, is that they are prone to power grabs of the kind observed at the UN General Assembly.¹² Any reform of ICANN - and Internet Governance more broadly - must therefore avoid the pitfalls of top-down, traditional international law-making processes.

Lack of accountability of ICANN's Board of Directors

Finally, one of the key criticisms of ICANN is the lack of accountability of its Board of Directors. While policy-making takes place through bottom-up coordination of various groups and advisory committees, ultimate decision-making power rests with the Board. In practice, interests groups who do not get what they want from the bottom up process often try to reverse or alter the results by going directly to the Board. The Board contributes to this problem by repeatedly altering processes and outcomes with special arrangements. In other words, the Board's decision-making processes lack transparency. This is compounded by the Board's lack of accountability for its decisions to any external authority.

This chronic accountability deficit has been the subject of several Accountability and Transparency Reviews and Recommendations over the years, some of which are examined in some detail further below.

¹⁰ See [Principle 50 of GAC Operating Principles](#).

¹¹ See Articles 4 and 5 of the GAC Operating Principles.

¹² See for example how the UNGA defeated an HRC initiative that would have strengthened protection of human rights defenders: <http://www.ishr.ch/news/un-general-assembly-turns-its-back-human-rights-defenders>



Current proposals for ICANN reform: an appraisal

Globalising ICANN

A number of proposals have been made to address the shortcomings outlined above. One of the likely topics up for discussion at the Brazil Net Mundial is the globalisation of ICANN, i.e. moving away from any remaining real or perceived control by the USG over ICANN. This discussion raises another two sets of issues: (i) the IANA function; (ii) the location of ICANN's headquarters.

Globalising the IANA function

The Internet Governance Project (IGP) has summarised the options available vis-a-vis the IANA function as follows:

Option 1: To continue with the status quo: this would involve the U.S. government exercising unilateral control over the nature of the functions embodied in the agreement and choosing the contractor

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • In practice, this system has worked well for the Internet and the DNS up until now; • The US has generally taken a hands off approach and not abused its position; • The US has a strong tradition of protecting freedom of expression: while US constitutional protections may not be applicable to ICANN decisions as such, it nonetheless informs the US government approach in its dealings with ICANN-related matters. 	<ul style="list-style-type: none"> • Unilateral USG authority over the IANA function has become unsustainable in the eyes of many governments and stakeholders. With the Net Mundial, there is momentum for this situation to change. ICANN must become truly independent from the USG to achieve international legitimacy, especially vis-a-vis other GAC members; • Continuing with the status quo arguably increases the threat of balkanisation of the internet in reaction to US control over the rootzone

Option 2: To multi-lateralise the contracting process: in this scenario, the U.S. would share its authority over the IANA function with other governments, either on a one-country, one-vote basis or through some subset or club of privileged governments

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • This would be a clear move away from sole US influence over the root / IANA function; • This would be a step towards internationalisation of ICANN and would give it greater legitimacy, especially vis-a-vis GAC members. 	<ul style="list-style-type: none"> • There would be a high risk of politicisation of the ICANN contracting process; • There would be considerable difficulties in determining which countries would be party to the contract and depending on which countries are selected and how, it might not

	<p>solve the legitimacy problem this approach seeks to solve;</p> <ul style="list-style-type: none"> • This would signal that Internet Governance is moving towards a more multilateral rather than truly global and multi-stakeholder process; • It is unclear that such multilateral contracting process would be practical for the purposes of executing the IANA function; • This would not necessarily solve the question of where ICANN's headquarters should be based. It is not impossible that ICANN would still have its headquarters in the US and would therefore still fall under US influence.
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Option 3: To de-nationalize the IANA function: this would involve fully delegating the IANA functions to nongovernmental actors in the private sector and civil society, and eventually eliminating the U.S. government's direct authority over it

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • The approach consisting in de-nationalizing the IANA functions would be in keeping with the multi-stakeholder model of Internet Governance; • The unbundling of the IANA functions that would be devolved to different private actors would avoid concentrating too many functions and powers in a single entity (such as ICANN, for instance) 	<ul style="list-style-type: none"> • Resistance from governments and a push for a multi-lateralised contracting process is to be expected; • With the exception of ICANN (which may seem like an obvious choice), it is unclear which other private actors could be entrusted with the execution of the IANA function. This would also raise questions as to how such actors are selected, including whether they are sufficiently mature to undertake such functions;¹³ • The multi-stakeholder model favours groups that have more resources because they can second more people to partake - and vote - in the process.

Option 4: Entrust the IANA function to an international organisation: this would involve delegating the IANA function to an international institution such as the International Telecommunications Union (ITU)

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • This would avoid the question as to which countries should be added to the IANA 	<ul style="list-style-type: none"> • This would render the process more multilateral;

¹³ This would be equally applicable to ICANN.

contract	<ul style="list-style-type: none"> • This would exclude the private sector, civil society and Internet users from the decision making which thus far has been crucial for the innovation and stability of the internet; • It is unclear whether the ITU is equipped to perform this function; • The execution of the IANA function could be turned into an overly bureaucratic exercise that would remain subject to political capture between the Member States. • From a political standpoint, it is unclear that such a proposal would be supported by key governments such as the US or the EU, as well as other stakeholders (including ICANN).
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"Internationalising" ICANN: where should ICANN's headquarters be based

Under current contractual arrangements, ICANN is required to have its headquarters in the US. Any unilateral move by ICANN to relocate elsewhere would therefore be in breach of its contractual obligations.

However, this is not the first time that the question whether ICANN's headquarters should remain in the US arises. In fact, Paul Twomey, ICANN's President and CEO between 2003 and 2009, had commissioned a [legal opinion](#) as to what status ICANN should try to achieve as a private international entity in its host country. The opinion examined a number of options including arrangements for a private entity in Switzerland, the US, France, Netherlands and the UK among others. In particular, it examined the possibility of obtaining immunities and privileges as a private entity rather than a subject of public international law. The report's preliminary conclusion was that there were a number of advantages to the Swiss model. The agreement between Switzerland and the International Olympic Committee was also of particular interest.

It is important to remember at this point that the question of ICANN's legal status and the location of its headquarters is very much an operational decision. For instance, changing legal status from a private sector entity to legal personality under public international law would entail significant changes in terms of immunities and privileges. Similarly, assuming that ICANN would remain a private entity, the decision to be based in a particular country would be based on factors such as a strong rule of law tradition (including reliability and independence of the court system); strong antitrust legislation; flexible employment laws etc. Moreover, any move to another jurisdiction would raise a host of issues regarding the validity and execution of current contractual obligations. For this reason, [a 2009 draft Implementation Plan for Improving Institutional Confidence](#) recommended that ICANN should retain its headquarters in the US to ensure certainty about ICANN's registry, registrar and IANA contracts. At the same time, the draft report recommended to retain a presence in countries with strong antitrust and competition law. As of now, ICANN retains "hub" offices in Singapore, Istanbul and Los Angeles and "engagement" offices in Beijing, Montevideo, Brussels and Washington DC.

Option 1: Remaining in the US, the applicable law remains Californian law, ICANN retains a

presence in other jurisdictions

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • There would be no need for negotiations with the USG to accept the move; • There is no obvious downside to the applicability of Californian law in practice; • This would avoid a legal nightmare in relation to ICANN's current contractual obligations with national registries; • This would not hinder ICANN's efforts to have a presence in other countries, which could respond to current concerns that the organisation is not sufficiently open to representation of developing countries. 	<ul style="list-style-type: none"> • This would not satisfy the perceived lack of independence from the US. Changing the location of ICANN's headquarters seems to have important symbolic value, especially for developing countries.

Option 2: Moving ICANN's headquarters to Switzerland or another country

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • It would be a symbolic move that satisfies the current perception/reality that ICANN is insufficiently independent from the USG 	<ul style="list-style-type: none"> • It would be legally complex and potentially problematic regarding ICANN's current contractual obligations with other parties, such as the national registries; • It is unclear that ICANN could maintain its status as non-profit private organisation; • This would raise further questions as to whether ICANN should acquire the legal personality of an international organisation, which in itself would be problematic as ICANN would become subordinate to the interests of Member States

Ensuring greater representation and engagement of developing countries

One of the key difficulties in turning ICANN into a truly global organisation is to ensure meaningful engagement of developing and least-developed countries. The ICANN Accountability and Transparency Review Team 2 made some recommendations in this respect, namely:

- The Board and the GNSO should charter a strategic initiative addressing the need for ensuring more global participation in GNSO policy development processes, as well as other GNSO processes. The focus should be on the viability and methodology of having the opportunity for equitable, substantive and robust participation from and representing:
 - a) All ICANN communities with an interest in gTLD policy and in particular, those represented within the GNSO;
 - b) Under-represented geographical regions;
 - c) Non-English speaking linguistic groups;
 - d) Those with non-Western cultural traditions; and

- e) Those with a vital interest in gTLD policy issues but who lack the financial support of industry players.

On the face of it, these recommendations are broadly positive. The real test, however, will lie in ICANN allocating sufficient funds for true engagement of developing countries to happen.

Government Advisory Committee (GAC)

Dissolution of the GAC

One of the IGP's proposals is to dissolve the GAC. The idea behind the proposal is that government representatives would be mainstreamed into ICANN's existing supporting organisations, such as the Generic Names Supporting Organisation (GNSO). In this way, governments would participate in policy-making but would be on an equal footing with other stakeholders.

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • Given the opacity of the GAC's working methods, it would make governments' contribution to the policy- and decision-making process far more transparent; • It would allow for more structural engagement from governments in policy-making at an early stage, which would improve cooperation between all stakeholders involved and lead to better outcomes; • Different government agencies would be allowed to participate, which would require the various governmental departments to better coordinate on the issue at hand; it would also allow drawing on from a greater pool of expertise within government. • To the extent that the GAC essentially functions like small-scale international organisations, some issues would arguably become less politicised or prone to political capture. 	<ul style="list-style-type: none"> • It is doubtful that governments would accept dissolution of the GAC, even if this would be compensated by participation of government representatives in ICANN's Supporting Organisations. • Even if some governments were prepared to accept this solution, it would alienate others, which would ultimately be counterproductive for ICANN's operations. • It is questionable whether a government representative could work in a sufficiently flexible manner to accommodate multi-stakeholder processes since it would still have to take instructions from his or her hierarchical superior that could lead to delays and therefore ineffectiveness within Supporting Organizations. • This would not solve the problem of under-representations of governments from developing countries.

Make the GAC more multi-stakeholder-like

An alternative to the GAC model has been presented by the ICANN [Accountability and Transparency Team 2](#) which responsible for improving the organisation's transparency and accountability under the Affirmation of Commitment. In particular, in its [final report](#) ATRT2 has recommended the following:

Consider whether and how to open GAC conference calls to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the

participation of liaisons from other ACs and SOs to the GAC, once that mechanism has been agreed upon and implemented” (ATRT 6.1.d);

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • Governments would feel less "threatened"; • It would improve the GAC by making it more open; • The GAC would benefit from other stakeholders' perspectives. 	<ul style="list-style-type: none"> • It is likely that Governments would still have the final say on GAC proceedings, resolutions or advice; • Ultimately, the GAC would still not be truly multistakeholder; • Making the GAC more open, would not necessarily mean that the GAC is more transparent in terms of its working methods, e.g. publication of minutes of meetings. • If GAC processes really were opened up to other stakeholders, the governments would resist this as much as option 1 outlined above; • It would undermine the GNSO, as stakeholders would gravitate toward GAC and ignore the bottom up GNSO process because of the authority conferred on GAC advice in the bylaws. This would exacerbate the problem of too many conflicting and overlapping policy inputs which give the Board arbitrary discretion.

Finally, it should be noted that the IGP put forward a proposal to make the GAC more multi-stakeholder-like from within government. In other words, there wouldn't be a single government representative for each country in the GAC. Rather, multiple governmental agencies could participate. This model would share many of the advantages outlined above, however government representatives would be less exposed to other viewpoints (e.g. industry or civil society). Moreover, this would do nothing to change the perception that the GAC is a club of states enjoying privileges that the other supporting organisations within ICANN currently do not have.

In short, while this type of reform would go some way towards improving the GAC, it would fall short of turning the GAC into a truly multi-stakeholder body.

Improved transparency and accountability of the GAC

Notwithstanding the above, the GAC would greatly benefit from taking steps towards greater transparency of its working methods. In particular, it would give it greater legitimacy and credibility. The most detailed recommendations in this area have been made by ICANN's Accountability and Transparency Review Teams 1 and 2, in particular:

Convening “GAC 101” or information sessions for the ICANN community, to provide greater insight into how individual GAC members prepare for ICANN meetings in national capitals, how the GAC agenda and work priorities are established, and how GAC members interact inter-sessionally and during GAC meetings to arrive at consensus GAC positions

that ultimately are forwarded to the ICANN Board as advice;

Publishing agendas for GAC meetings, conference calls, etc., on the GAC website seven days in advance of the meetings and publishing meeting minutes on the GAC website within seven days after each meeting or conference call;

Updating and improving the GAC website to more accurately describe GAC activities, including inter-sessional activities, as well as publishing all relevant GAC transcripts, positions and correspondence;

Considering whether and how to open GAC conference calls to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the participation of liaisons from other ACs and SOs to the GAC, once that mechanism has been agreed upon and implemented;

Considering how to structure GAC meetings and work inter-sessionally so that during the three public ICANN meetings a year the GAC is engaging with the community and not sitting in a room debating itself;

Providing clarity regarding the role of the leadership of the GAC; and

When deliberating on matters affecting particular entities, to the extent reasonable and practical, give those entities the opportunity to present to the GAC as a whole prior to its deliberations.

In addition, the ATRT 1 & 2 recommended that the Board work jointly with the GAC through the Board-GAC Recommendation Implementation Working Group (BGRI working group) on the following matters:

Facilitating the GAC formally adopting a policy of open meetings to increase transparency into GAC deliberations and to establish and publish clear criteria for closed sessions;

Encouraging the GAC to develop and publish reasons for GAC Advice at the time Advice is provided. Such rationales should be recorded in the GAC register. The register should also include a record of how the ICANN Board responded to each item of advice;

Developing and documenting a formal process for notifying and requesting GAC advice;

Proposing and voting on appropriate bylaw changes to formally implement the documented process for Board-GAC bylaws consultation;

Identifying and implementing initiatives that can remove barriers for participation, including language barriers, and improve understanding of the ICANN model and access to relevant ICANN information for GAC members. The BGRI working group should consider how the GAC can improve its procedures to ensure more efficient, transparent and inclusive decision-making. The BGRI working group should develop GAC engagement best practices for its members that could include issues such as: conflict of interest; transparency and accountability; adequate domestic resource commitments; routine consultation with local Domain Name System (DNS) stakeholder and interest groups; and an expectation that positions taken within the GAC reflect the fully coordinated domestic government position and are consistent with existing relevant national and international laws;

Ensure regular senior officials' meetings by asking the GAC to convene a High Level meeting on a regular basis, preferably at least once every two years. Countries and

territories that do not currently have GAC representatives should also be invited and a stock-taking after each High Level meeting should occur;

Working with ICANN's [Global Stakeholder Engagement group \(GSE\)](#) to develop guidelines for engaging governments, both current and non-GAC members, to ensure coordination and synergy of efforts;

The Board should instruct the GSE group to develop, with community input, a baseline and set of measurable goals for stakeholder engagement that addresses the following:

- Relationships with GAC and non-GAC member countries, including the development of a database of contact information for relevant government ministers;
- Tools to summarize and communicate in a more structured manner government involvement in ICANN, via the GAC, as a way to increase transparency on how ICANN reacts to GAC advice (e.g. by using information in the GAC advice register);
- Making ICANN's work relevant for stakeholders in those parts of the world with limited participation; and,
- Develop and execute for each region of the world a plan to ensure that local enterprises and entrepreneurs fully and on equal terms can make use of ICANN's services including new gTLD's.

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • The above recommendations are broadly positive and would significantly contribute to a better understanding of GAC's processes; • This would in turn give the GAC greater legitimacy among stakeholders. 	<ul style="list-style-type: none"> • Open processes could lead GAC members to use of back-channels for actual negotiations; • Increased pressure on GAC secretariat; • Increased pressure on non-state actors to monitor GAC, further diminishing participation and commitment to the GNSO process; • The recommendations are made to the Board to work jointly with the GAC and only require limited input from ICANN's other constituencies

Improving transparency and accountability of the Board

Making the Board's decision-making process more transparent

One of the key failings of the Board, which could easily be remedied, is the lack of transparency of its decision-making process. As already noted above, this could be improved, among other things, by putting in place a register recording GAC's advice and the Board's responses. A further aspect of transparency and accountability would be for the Board's decisions to be both publicised and duly reasoned. It is also worth noting that in 2012, a Board of Directors' Code of Conduct was introduced to deal with conflict of interest issues.

In addition, further measures could be taken to improve transparency within the organisation. In particular, the ATRT2 recommended the following:

The Board should review redaction standards for Board documents, Document Information

Disclosure Policy (DIDP) and any other ICANN documents to create a single published redaction policy. Institute a process to regularly evaluate redacted material to determine if redactions are still required and if not, ensure that redactions are removed.

The development of Transparency Metrics and Reporting, including:

The Board should ensure that as part of its yearly report, ICANN include, among other things, but not be limited to:

- A report on the broad range of Transparency issues with supporting metrics to facilitate accountability.
-
- A discussion of the degree to which ICANN, both staff and community, are adhering to a default standard of transparency in all policy, implementation and administrative actions; as well as the degree to which all narratives, redaction, or other practices used to not disclose information to the ICANN community are documented in a transparent manner.
- Statistical reporting to include at least the following elements:
 - i. requests of the Documentary Information Disclosure Policy (DIDP) process and the disposition of requests.
 - ii. percentage of redacted-to-unredacted Board briefing materials released to the general public.
 - iii. number and nature of issues that the Board determined should be treated confidentially.
 - iv. other ICANN usage of redaction and other methods to not disclose information to the community and statistics on reasons given for usage of such methods.

A section on employee “Anonymous Hotline” and/or other whistleblowing activity, to include metrics on:

- i) Reports submitted.
- ii) Reports verified as containing issues requiring action.
- iii) Reports that resulted in change to ICANN practices.

An analysis of the continued relevance and usefulness of existing transparency metrics.

The above measures would contribute to making the Board more transparent and accountable. However, this should not be seen as nearly enough for the organisation to be truly transparent and accountable. In particular, accountability requires at the very least strong internal accountability processes.

Improving internal accountability processes

There are currently at least three different avenues for review of the Board's actions in ICANN:

- Reconsideration by the Board Reviewing Committee;
- Independent Review of Board Actions carried out by the Independent Review Process Panel (IRPP). IRPP proceedings are administered by the International Centre for Dispute Resolution (ICDR, the dispute resolution branch of the American Bar Association) and are subject to arbitration procedural rules.
- The Ombudsman: its jurisdiction is confined to complaints about unfair treatment by ICANN, decisions, actions or inactions of ICANN's supporting organisations as well as decisions, actions, or inactions by the Board of Directors that may be inconsistent with the Articles of Incorporation or the Bylaws. The Ombudsman has investigative powers but can only use alternative dispute resolution mechanisms to resolve complaints. It cannot reverse a decision of the Board, for instance, but may a recommendation to the Board where appropriate.

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> Fairly comprehensive internal review mechanisms. 	<ul style="list-style-type: none"> Despite a number of internal reviewing processes, ICANN is still viewed as an insufficiently accountable organisation by various stakeholder groups; The above accountability mechanisms are weak; Reconsideration by the BCR does not offer guarantees of independence; The Reviewing process carried out by the IRPP only leads to declaratory rather than binding decisions; IRPP proceedings follow arbitration procedural rules, i.e. involves a certain amount of secrecy /confidentiality and it appears that IRP Declarations do not contain reasons. the Ombudsman's jurisdiction and powers are extremely limited. In particular, the Ombudsman does not have the power to make, change or set aside a policy, administrative or Board decision, act, or omission. As the above demonstrates, there is no real appeals process.

The question therefore becomes what other internal accountability mechanisms could be put in place. One suggestion, made by the IGP, is that ICANN should become a membership organisation. That would ensure ICANN's accountability to its members, who would benefit from voting rights.

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> Assuming proper regional representation, this would be the most direct way of ensuring internal accountability; This could contribute to ICANN obtaining certain privileges and immunities if it sought to establish subsidiaries in countries such as Switzerland. 	<ul style="list-style-type: none"> ICANN's history suggests very little appetite for this solution. Membership was abolished in 2002 and replaced with the At Large Advisory Committee and the Nominating Committee. If ICANN were to be turned into a membership organisation, the question would arise as to who could become a member. This would raise further issues of representation and practicality if membership was open to potentially millions of Internet users

In addition, it is worth pointing out that the President's Strategy Committee (PSC) recommended the creation of an extraordinary mechanism for the community to remove and replace the Board in special circumstances in its 2009 Draft Implementation Plan for

Improving Institutional Confidence. It appears that this recommendation was not followed through but may provide a useful additional accountability mechanism.

External accountability

As already noted by the IGP, external accountability in the context of a transnational organisation is [a complex matter](#). In particular, national models of accountability cannot be easily transposed to organisations such as ICANN. Nonetheless, we attempt to sketch out some basic accountability models below:

Option 1: Review by an international organisation (such as the ITU or a committee of the UN General Assembly)

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> Accountability would be external to ICANN 	<ul style="list-style-type: none"> In essence, ICANN would become accountable to Member States. In other words, this would run up against the multistakeholder model within which ICANN has operated up until now. This could run the risk of ICANN becoming far more politicised, with a top down accountability model

Option 2: Review by a multistakeholder body (such as the IGF-MAG)

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> This would be in keeping with the multi-stakeholder model 	<ul style="list-style-type: none"> A multi-stakeholder make-up does not guarantee independence; The IGF-MAG currently lacks transparency, which is not conducive to proper review; To the extent that the IGF-MAG is partly funded by ICANN, this would have to stop in order to avoid the withdrawal of funding to be used as a threat; It is unclear that the IGF-MAG would be sufficiently qualified to properly review ICANN’s Board decision or that it would be up to the task although that would arguable depend on adequate levels of funding

Option 3: Review by an external independent body

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> Accountability would be external and its independence would be guaranteed 	<ul style="list-style-type: none"> This would almost certainly require the adoption of a treaty establishing this entity,

	<p>i.e. a multilateral process (e.g. International Criminal Court).</p> <ul style="list-style-type: none"> • The question would arise whether such an adjudicatory body is competent to rule on policy-matters. This could prove controversial. • This would raise additional questions as to how its members are nominated to ensure their independence as well as issues of funding, expenditure and so forth. • Ultimately, this would open the question whether ICANN should not have legal personality under public international law, i.e. a change in its status
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Option 4: Possibility of appeals to domestic courts where ICANN is based

Our assessment:

Pros	Cons
<ul style="list-style-type: none"> • In countries with a strong rule of law tradition such as the US, the courts are independent and the various applicable rules and laws offer guarantees of legal certainty, which is important given the scope of ICANN's powers and the economic implications of some of its decisions 	<ul style="list-style-type: none"> • There is a risk of forum shopping, i.e. of ICANN's having its seat in a jurisdiction that is likely to be more favourable to its business interests. • The scope of local courts' jurisdiction might be limited to certain types of issues, such as competition but may not include disputes in which the right to freedom of expression is at stake, for instance

Our proposal

Reform of ICANN is inevitable if it is to fulfil its promise as a truly global multistakeholder organisation. In order to succeed, we believe that any reform of ICANN should be guided by the following principles:

- Multi-stakeholder, not multilateral;
- Human Rights, in particular the rights to free expression, privacy and due process.
- Transparency and Accountability
- Inclusiveness and Diversity

We further believe that these principles should be reflected and protected in relation to the following aspects of ICANN's corporate governance: (i) the organisation's legal status; (ii) its mandate; (iii) its location and applicable law; (iv) the IANA contract arrangements; (v) representation and participation of developing countries; (vi) GAC's composition, modus operandi and powers; (vii) accountability of the Board. We elaborate on these aspects further below.

ICANN's legal status

In order to both ensure ICANN's independence and protect it from the disproportionate influence of governments, we believe that ICANN's nongovernmental status should be affirmed and formalised.¹⁴ By the same token, it would allow for ICANN's nature as a multistakeholder organisation to be both maintained and strengthened.

For the same reason, we would oppose turning ICANN into an international inter-governmental organisation, which would make the organisation subordinate to the interests of Member States.

Mandate

Although ICANN's foray in content regulation has been very limited so far (see, for instance .xxx controversy)¹⁵, we are concerned that its policy-making powers could in principle allow it to engage in these kinds of activities to a greater degree. We therefore recommend that ICANN's mandate should be clarified and narrowed, for example by:¹⁶

- Introducing a provision in ICANN's bylaws prohibiting the organisation from engaging in content regulation or conduct that would violate the rights to freedom of expression or privacy.

¹⁴ This recommendation is based on an earlier proposal made by the Internet Governance Project (IGP), which we support: <http://www.internetgovernance.org/2013/10/16/a-blueprint-for-the-future-oversight-of-icann/>

¹⁵ See for instance: http://www.huffingtonpost.com/2012/03/23/icann-web-address-controversy-deepens-after-us-warning_n_1375470.html

¹⁶ This proposal is broadly in line with the IGP proposal referred in n 13 above.

- Introducing in ICANN's bylaws a right of private parties to initiate legal challenges to ICANN actions on these grounds, which could be taken before the local courts or, in exceptional circumstances before an arbitration tribunal.
- The resolution of trademark and other Intellectual Property disputes should duly take into account the right to freedom of expression and the right to culture as laid down in international instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

Location / Applicable law

We propose that to the extent that ICANN should remain a non-profit public benefit corporate organisation, the Californian law would appear suitable. However, in line with the PSC's 2009 report, it may be desirable for ICANN to delegate some of its functions to subsidiaries that would be located elsewhere.

There are a number of advantages to ICANN not moving its headquarters outside the US:

- it would ensure the stability of current contractual arrangements with registries, registrars etc.;
- there would be no need to negotiate with the USG;
- it would not prevent ICANN from expanding its reach beyond the US. To a certain extent, that has already taken place through the creation of various hub and engagement offices around the world.

Ultimately, the question whether ICANN should create subsidiaries outside the US is very much an operational decision, involving numerous parameters, that is beyond the scope of the present document. Nonetheless, it is worth noting that in excluding certain jurisdictions from the scope of the PSC's review, the following disqualifying factors were taken into consideration:

1. membership structure requirement;
2. no provision for tax exempt status;
3. requirement of stock issuance and development of a shareholder model;
4. continued presence or headquarters in the US would not be permitted;
5. governmental oversight and authority would be required;
6. a significant number of Board members would be required to reside in the jurisdiction and be of local nationality;
7. the organization would be required to operate solely on donations;
8. only a temporary presence would be permitted; and/or
9. the organisation would have limited ability to recruit and hire foreign employees.

Of the nine factors listed above, 1 and 4 are particularly interesting:

- the first, because membership is an important aspect of internal accountability. A legal opinion highlighted that the lack of a General Assembly could undermine ICANN's ability to seek privileges and immunities in a host country
- the fourth suggests that the laws of the various corporate entities at issue (i.e. ICANN and its subsidiaries, if any) would need to be compatible.

Finally, it is worth noting that the PSC 2009 report suggested that Switzerland and Belgium might offer suitable solutions for ICANN to pursue its objective of international expansion. If,

for example, ICANN were to decide to open a subsidiary in Switzerland, an interesting question might be whether the IANA function or one aspect of it could be delegated to that entity.

Denationalise the IANA contract

We believe that acceptable solutions for assignment of the IANA root zone function should meet several criteria:

1. protection of the root zone from political or other improper interference;
2. integrity, stability, continuity, security and robustness of the administration of the root zone;
3. widespread trust by Internet users in the administration of this function;
4. support of a single unified root zone; and
5. agreement regarding an accountability mechanism for this function that is broadly accepted as being in the global public interest.

In order to protect the rootzone from political interference, we believe that multi-lateralisation of the IANA contract should be avoided. Rather, to the extent that it is functionally feasible, it would be preferable for the IANA function to be delegated to different private entities along the lines suggested by the [IGP](#). For instance, there is no reason in principle why the IANA functions should be concentrated in ICANN, which already performs a wide range of functions. Greater effectiveness and accountability are more likely to be achieved through a distributed model of governance here, i.e. different technical functions and policy issues being decided by separate multistakeholder organisations.

Improved representation and participation of developing countries

We recommend that

- Improved representation and participation of developing countries should take place both within ICANN generally and the GAC specifically.
- Sufficient fund should be allocated to this end, for instance by redirecting some of the revenues from gTLD domain name registrations to developing countries.
- In line with ATRT 2 recommendations, ICANN should translate all its working documents, policy, minutes of meetings in the UN official languages.

Making the GAC more inclusive, transparent and accountable

In order to make the GAC more inclusive, transparent and accountable, following measures should be taken:

- Following the recommendations of the Accountability and Transparency Review Teams, we propose that GAC's proceedings should be made open to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the participation of liaisons from other Advisory Committees and Supporting Organisations to the GAC, once that mechanism has been agreed upon and

implemented.

- The GAC's working methods should be made more transparent along the lines recommended by the ATRT 1 and 2.
- There is no reason in principle why GAC's advice should be given more weight than that of other advisory committees. The same privilege should be extended to the other advisory groups, e.g ALAC and SSAC, by amending ICANN's bylaws accordingly. More generally, the GAC should be on an equal footing with the other ACs.
- Granting any additional powers to the GAC should be firmly resisted, including the delegation of ccTLDs to governments. Whilst this may seem as naturally falling within states' jurisdictions, it carries with it high risks for the right to freedom of expression if used as a means to control content.¹⁷
- Consideration should be given to mainstreaming government representatives participation within supporting organisations, in particular the GNSO. A working group could be put in place to that effect.

Accountability of the Board

We recommend that

- The decision-making process of the Board is made more transparent in line with ATRT2 recommendations, including the giving of reasons for its decisions.
- The Independent Review of Board Actions should be strengthened. At a minimum, the IRPP's decisions should be both binding and contain reasons, which should be made public as a matter of principle;
- There should be a possibility to call for dissolution of the Board in exceptional circumstances;
- If ICANN's status as a private organisation is to be retained, consideration should be given to broadening the scope of the issues that can be taken up before the local courts, in particular issues relating to the right to freedom of expression. Another possibility would be to include a unilateral option clause that would enable a choice between the local courts or arbitration proceedings.

¹⁷ See 2005 Joint Declaration of Special mandates on Freedom of Expression, available at: <http://www.article19.org/data/files/pdfs/standards/three-mandates-dec-2005.pdf>

Conclusions

For ICANN's reform to be successful, it is vital for the private sector, civil society, governments and users to be engaged in conversations about Internet Governance because of their inherent value for innovation, protection of rights, stability and security. We hope that the above proposal will help stimulate discussion about reform of ICANN.

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