

Independent Discussion Draft

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A New Approach to ICANN Reform:

The Heathrow Declaration

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Preamble

This declaration emanates from a recognition that while ICANN is a well-analyzed institution, few credible proposals for reform exist. <<Over the years there have been several such proposals, starting with the Boston Working Group's submission to NTIA.>> Accordingly, this proposal first outlines certain premises that we consider to be necessary and important. The principles incorporated in this document were arrived at from various discussions with interested parties in Accra at the recent ICANN meeting, statements and discussions held online following the publication of the Lynn Proposal in addition to the private thinking of the authors of this document. It is upon these premises and principles that we proceed to elaborate on a proposed Board structure for ICANN that we think are consistent with those principles. This elaboration also takes into account the proposals made and the concerns expressed by Stuart Lynn, President of ICANN, about perceived deficiencies in ICANN's processes and structure.

ICANN has been selected by the United States' government to run the DNS from among a number of proposals submitted "precisely because it was open, consensus-based, and rooted in the Internet community"¹. <<Again, a bit of history - ICANN was selected because it was the groomed choice of NTIA, not because it was somehow better than the other proposals. Indeed the pre-birth story of the proposal that became ICANN was rather divergent from the idea of "open and consensus-based".>> The goal of reforming ICANN is to make it work better. Consensus-based decision-making may not always be appropriate where commercial interests <<consensus-based doesn't work well even when the conflict isn't commercial>> conflict. This does not mean that in future ICANN should be closed, hierarchical, and divorced from the industries, communities, and consumers that it serves.

Our goal is to foster a productive discussion among the parties that make up ICANN, or who have an interest in the good management of the DNS. We all have a serious interest in keeping ICANN, or something very much like it, able to perform those necessary functions of domain name management for which it was created. Let us cooperate in the task of making it work well. <<Don't forget that ICANN also encompasses IP address allocation, protocol parameters (or rather, disputes over protocol parameters, as the parameters themselves come from groups like the IETF), and that vague thing called "the IANA function".>>

The purpose of this document is to provide a departure point for positive and directive discussion of ICANN reform. The authors do not see this document as an endpoint but as a starting point and are hopeful that interested and informed parties will

¹ Stuart Lynn, "A unique, authoritative root for the DNS", 9 July 2001, <http://www.icann.org/icp/icp-3.htm>, at page 13<<Please note that I, along with many others, consider that document to be more of an exercise in near-religious dogma than in rational technical thought. Also note that this writer has successfully used DNS roots other than that of NTIA/ICANN for half a decade.>>

expand on the ideas expressed herein, especially within areas of their specific subject matter. We expect interested parties to dissect this document and pursue specific discussions on the various points and principles made. An analysis of this nature will allow for the creation of a structure that supports and informed statement of the specific ideals that will allow ICANN to work well.

This discussion will be fostered through the website at <http://www.byte.org/heathrow> and the associated mailing list found at the website. This discussion is not intended to be exhaustive, nor should it be (although it may be) the only thread of its kind. The more voices that weigh in, the more refined the output will be and the more valid the conclusions will become. However, this discussion must necessarily be rational, informed and must be managed towards the goals stated in this document.

Premises

Our premises are that

1. The governance of the DNS is a matter of the common convenience in being able to locate Internet-based resources, which governance should be suitable for the mundane purposes and nature of the problems that the DNS solves;
2. The Internet, and the Domain Name System in particular, work because of a high degree of voluntary cooperation among carriers, root servers, registrars, registries, and standards-setting organizations; *<<I disagree that a "high degree" of cooperation is needed. In fact, DNS seems rather resilient to non-cooperation; we haven't seen any real problems even though there exist several root systems today, some of which are used by non-trivial sized communities (such as whole countries). There is a consolidating pressure which is exerted by the desire of people running and using pieces of DNS to be able to share names with one another; this provides a kind of DNS gravitational force that, although one can work against it, tends to bring things together in the end.>>*
3. The Internet, and the DNS in particular, cannot be made to work without that high degree of cooperation among private interests and actors; *<<Again, I disagree. The genius of the Internet is that it runs even despite the divergent and uncoordinated efforts of many parties. Personally I find it best to think of DNS as a layered-on naming service that can be offered by many distinct providers.>>*
4. Private actors and interests are capable of self-government: of being represented and having their conflicts resolved within a structure of largely voluntary, self-interested compliance, assisted by an authority capable of enforcing necessary common rules with contractual or other means of enforcement;
5. Governments, domain name registrants and users, and users of the DNS itself have legitimate and distinct interests in the well-being of these necessary, if temporary, arrangements;
6. Governments have particular interests in the management of country codes, which interest is separate and distinct from that of ICANN with respect to country codes¹ [further commentary follows at the end of this document].

From these premises several positions naturally follow.

The legitimacy of ICANN

ICANN's basic idea is legitimate: a private-sector organization, founded in corporate law rather than international treaty, is an appropriate political and legal arrangement to engage in the management of the DNS. Private interests in the DNS are best expressed and dealt with directly, rather than through the indirect apparatus of governments.

The appropriate test of success or failure

The criterion of success of the DNS is the common convenience of mankind in being able to locate resources on the Internet efficiently. <<DNS is not a directory; DNS is not a tool to locate resources. DNS is, rather, a system for taking structured names using those names to look up records. DNS makes, and can make, no guarantee or otherwise make any authoritative statement that the contents of those records bear any resemblance to any particular resource on the net.>> Failure of the DNS to serve that function might be repaired or compensated for by the use of other resource locators. Fixing the governance of the DNS will not in and of itself fix any failures of the DNS, however strong and appropriate governanceⁱⁱ will provide a suitable vehicle for addressing these failures when required. Ambiguities in the governing documents of ICANN, or failures to achieve contracts with all players involved in the DNS within a certain period of time, are not the same as an actual failure of the Domain Name System to perform its functions, and should not be treated as such. One should not confuse failure to achieve agreements with an actual failure of that necessary cooperation on which the DNS relies. Indeed, proposals should not seek to compel a cooperation that already exists. Obedience can be compelled, but not cooperation.

Participation in self-government

We are ICANN.

ICANN should not be a structure that stands outside and above the governed; it should embody the principles of self-government. This does not imply that every part of the structure is elected or democratic; there is a role for the ascription of expertise and of prestigious individuals to the tasks at hand. Yet the function of ICANN is to maintain the public interest in a convenient, effective and affordable domain name system, for as long as we need one, and not longer. It is not the basis of democratic world government, or even the governance of the Internet. Its role is humble; its goal is to be useful. When the time comes for it to die, it should be able to disappear.

Principles that will guide ICANN reform

1. The governance of the DNS should be appropriate and proportionate to the nature and needs of the DNS. Accordingly, the governance of the DNS should not outlast the useful life of the DNS. This result is more likely to be achieved if governance of the DNS is more responsive to popular demand for domain names and a coherent working DNS than to formal arrangements among states.
2. Owing to the role of states in the management of country codes, the role of a central manager of the DNS, such as ICANN, is naturally larger in relation to generic TLDs than it is in relation to country codes.
3. Those who wish to participate in the management of the DNS should contribute to the funding of it, possibly with some exception for non-profit entities.
4. Businesses need a structure that resolves issues quickly. *<<Speed of resolution should not compromise other matters, such as fairness and due process. The legal systems that are implicitly blamed for being slow do so because they encompass those other concerns. It is unlikely that an ICANN that does encompass such concerns will be any better, or speedier, than existing legal systems.>>* The future structure of ICANN or its successor should be tested against this criterion. *<<The concerns of business are not the only criteria - the concerns of people do matter.>>* This means that rules must specify voters, election procedures, and what constitutes a majority suitable to decide an issue. Consensus is not a sufficiently precise basis for action. The decisions of stakeholders should be capable of being enforced or supported by ICANN's Board. *<<There's that ugly word "stakeholder" - it contains within itself the seeds of eventual failure because the power to select who is and who is not a "stakeholder" is the power to pre-dictate the answer to many of the questions that will come before the organization.>>*

Speaking of stakeholders - a future ICANN needs to resolve the fact that virtually all of the decisions made to date have been made during periods in which the majority of those on the network have been excluded from ICANN. Unless some sunset measures are used to bring things already done up for re-enactment, any reform will be more illusory than real.

5. Registrants of domain names have a greater claim on the attention of ICANN than end users who do not own domain names. *<<I most strongly disagree. To my ears the claim made in this paragraph is akin to that of an airline claiming that its interests in safety are greater than that of the passengers on board.>>* The interests of domain name registrants and users are broad and varied. ICANN must provide a mechanism by which the interests of Registrants are actively taken into account.

6. Internet Users who are not registrantsⁱⁱⁱ, being without a contractual link to ICANN, have interests that are distinct from those of governments. Internet users are affected by whether the symbols they type resolve to websites they seek. <<The Internet is not the world wide web; the Internet is much larger. And users do not always Some avenue of participation in DNS management, apart from registrars themselves, is desirable, and it is appropriate that they pay for this input in some measure. <<The model of DNS registries and registrars is but one model of many that are possible. For example, I'm rather interested in systems in which domain name "ownership" is represented by a transferable digital certificate, thus obviating any concept of a registrar or even of a "whois" system.>>

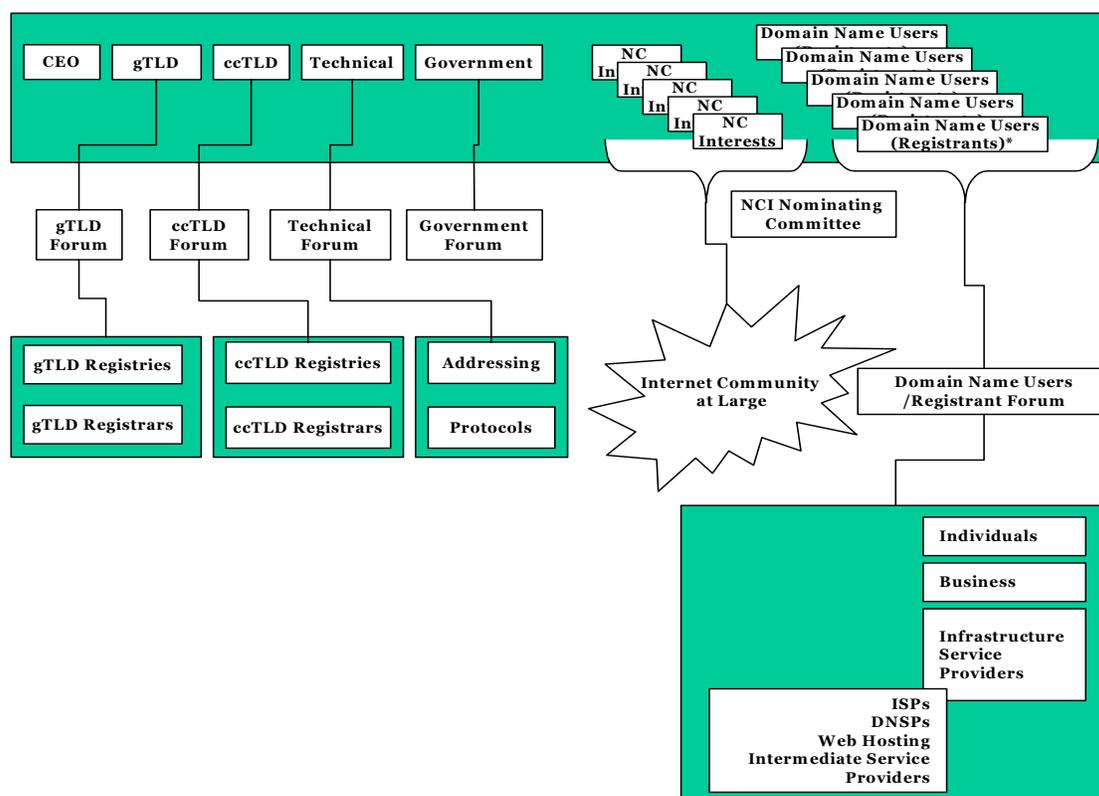
Organizational Proposal

We acknowledge that these principles do not automatically lead to each and every one of the organizational proposals set forth below. People will have honest differences of opinion regarding the appropriate role of the electoral principle, to any limitations on the democratic principle, the weight to be given to certain constituencies<<and even whether there should be "constituencies" beyond those that are dynamically created and destroyed by the ebb and flow of self interest>>, and the time it should take to transit from a nominated to a partly or fully elected structure.

The chief questions concern:

- How is policy to be decided? <<There's a prior question: What is the appropriate scope in which ICANN can create policies?>>
- What are the appropriate checks and balances? <<Not merely checks-and-balances, but outright prohibitions>>

Board Construction



**Note: Neither the term “Domain Name Users” nor “Registrant” adequately describes the scope of this important group of stakeholders <<There’s that awful word “stakeholders” again, can we drop the use of the idea of pre-conceived “stakeholder”; it poisons the whole dialogue you are trying to foster.>>. For the purpose of this document, these two terms are used interchangeably to describe entities that have a direct stake in the governance of the DNS through either direct or indirect contracts with the governing body. It need be explicitly stated that this is an entirely different group of stakeholders than the “Non-Contracted Interests” for reasons set out elsewhere in this document.*

Our assumptions are that:

- There will be an ICANN, or a successor organization for the same purposes, and that it will be governed by a Board of Directors comprised of fifteen individuals; <<From a purely operational point of view, 15 is an unwieldy number, it’s too large.>>
- Five of the Board seats will be or represent, respectively, the CEO of ICANN, the Government Forum, the Technical Forum, the gTLD Forum, and the

ccTLD Forum; <<If ICANN has taught us anything it is that having the corporate President/CEO on the board is a bad idea. It places too much power in one person and muddies the distinction between the making of policy and the execution of that policy.>>

- There will be some form of membership which will be represent the interest of domain name registrants, who will also be entitled to seats on the Board of ICANN;
- These representatives will in time be directly elected in ways that we have not yet devised;
- There will be a transitional period during which they will be selected by a nomination committee with different criteria;
- A nomination committee will select another five members of the Board of ICANN, and this arrangement will be perpetual.

Given that we do not yet have a clear statement of what ICANN-nouvelle is to do, I'm not yet willing to decide whether the above makes sense or not. For example, given the history of what ICANN has done to date, little if any of which is technical, it is unclear that there needs to be any technical input beyond that of a staff position to answer questions that the policymakers may have or to warn them of consequences of policy decisions.

Making policy

We foresee that policy will be made both in the policy forums and consented to by the board, and made on occasion by the board of ICANN itself. We are quite sure that there will be conflicts of opinion within forums, among the forums, and between the forums and the Board. <<Under corporate law, at least as it exists in many of the States of the United States, the Board of Directors has the ultimate responsibility and it can not abrogate this responsibility by giving other people or "forums" a power of choice that the Board can not supersede.>> This is normal. That consensus would be achievable is the one area where the original assumptions of ICANN, based as they were in the culture of the academics who created the Internet, has proven to be in error.

Contrary to the current idea that the Board should only endorse a previously made consensus, the Board of ICANN should be able to initiate decisions as well as to receive policy proposals from below for advice and consent.<<Under ICANN's existing bylaws, the Board has delegated policy making in various areas to the SO's. And the Board has established a bylaw that, in the case the board does not accept the policy decision of an SO, to either send it back to the SO or to make a finding that there is an overriding need to bypass the SO's decision. This mechanism has utterly failed in the ICANN of today; the Board virtually ignores the SO's yet it has never made a finding that there is an overriding need to ignore the SO's decisions.>>

This could be made to work if the obligation of the board to follow the policy directives of the SO's were made even more clear than it is already - perhaps by moving it into the Articles of Incorporation and making the language much more clear. And also by requiring that the finding required to override be made by a supermajority of the board and not a mere majority.

The alternative is to eliminate the concept of SO's altogether and permit any body of interests to consolidate at their whim and to present petitions or other materials to the Board of Directors.

But when the rubber meets the road, the real difficult is that these decisions take time and energy and the Board is filled by people who do their work on a part-time basis. Thus the Board defers to "staff" to a degree that has gone beyond unhealthy.

The inevitability of conflicts and the need for balances

Preparing for conflict should be the task of those who want a new ICANN constitution. The resolution of conflict should not be assumed away because new structures are envisaged, or new players invited to participate. This is why we emphasize the importance of stated jurisdictions for forums, explicit criteria for the selection of people, and explicit voting rules for the resolution of issues.

None of this is beyond the competence of good lawyers and constitution-makers to deal with. <<We are dealing with an entity that must exist under the corporations laws of some nation. The kind of distributed ultimate responsibility that is implicit in the concept of balances is likely to be contrary to the idea found in the corporations laws of many jurisdictions that there be a well defined ultimate authority in the corporation onto which may be place the ultimate responsibility (and potential liability) for acts of the entity. In other words, such an entity as is being suggested by require the creation of a new kind of legal regime.>>

The constitution of ICANN should specify the types of decision which call for majorities, and which call for super-majorities, such as a two-thirds vote.

We propose that when policy is devised by a forum that is vested with the subject matter, a simple majority of the board should suffice to set policy. This implies that the jurisdiction of forums shall be specified in ICANN's revised constitution.

We propose that when policy is devised by the Board, and imposed on a forum or forums against its or their wills, that a two-thirds majority of the Board be required.

The Board, without serious consideration and a super majority, should not overturn a forum vested with the subject matter in its decisions.

The need for criteria

We foresee that there will need to be different criteria for the different decisions and situations that the new structure will generate.

1. Choosing outsiders for the nomination committee

The Lynn proposals foresee that there will be a nomination committee to select ten Board members, composed of one representative each of:

- ISPs
- The GAC
- The gTLD forum
- Business
- The technical forum, and
- The CEO of ICANN
- Plus an unspecified number of outsiders.

The constitution should specify the criteria for the selection of the nominating committee.

Nominating committees, particularly of the form specified in the Lynn proposal tend to be Councils of Orthodoxy, thus ensuring that the organization will quickly ossify into a body that elevates self-perpetuation above all else and will likely serve as an impediment to innovation on the Internet.

Rather than "nominating committees" there must be means for anyone to throw his or her hat into the ring and make a run for the ultimate seats of power in the new ICANN.

2. The Domain Name Users/Registrant Forum

Which interests will be entitled to sit on this forum?

3. Business

Which business interests require appropriate representation in the users' forum?

4. Domain Name Users/Registrants Board Representatives

What criteria should be specified to govern the selection of the five users' representatives in the interim process of selection of these people for the Board?

5. NCI Board Representatives

What criteria should be specified to govern the selection of the five "best interest of ICANN" representatives in the process of selection of these people for the Board?

6. Subject matters for policy forums

The exclusive and the shared jurisdictions of the policy forums will need to be devised.

Commentary

My sense is that until we have a clear and precise statement of what is the job of ICANN (and I mean ICANN and not some ICANN/IANA blend) then it is an exercise in building castles on clouds to do more than outline principles of participation and principles of decisionmaking.

The exact structural form of ICANN-II should wait until we know what it needs to do and, perhaps more importantly, what it must not do.

ⁱ **Scope of National Authority vis-à-vis Country Code Top-Level Domains** - There need be a clearly delineated division of powers in the governance of ccTLDs between ICANN and nation states. This sum of these powers should be loosely equivalent to those exercised by ICANN with respect to gTLDs.

The specific powers of ICANN with respect to ccTLDs should be narrow in scope and express. Areas not specifically attributable to ICANN should be assumed to be the responsibility of nation states.

Different countries will approach Internet governance differently. Some will exercise control through the organs of government. Others will deal with these issues through broad-based groups on interested parties. This document expresses no opinion on these varied approaches, but instead will try and propose a framework that allows for the broad range of approaches.

Areas of ICANN Responsibility

- Delegation of nameservers;
- Maintenance of appropriate delegation in root servers;
- Minimum level of operational standards;
- OTHERS?

Areas of National Authority

- Nexus requirements;
- Transfer policy;
- Registrar accreditation;
- Competition issues;
- OTHERS?

We reiterate that areas of authority not specifically enumerated should be deemed to be areas of national authority. In addition, as with all elements of this document, these delineations of authority should be open to change over time as appropriate.

With respect to funding we propose a tiered structure based upon number of registrations with the lowest tier incurring no fee. Specific proposals must be tabled based on an analysis of specific registration numbers in the various ccTLDs.

ii Clarification Regarding “Strong and Appropriate Governance” – The phrase “strong & appropriate governance” is intended to describe a structure that possesses the resources, conviction and capability to act in the best interests of the DNS and larger Internet without requiring the structure to inappropriately inure to potentially stronger, self-interested actors in order to gain political or economic leverage. This leverage must be naturally inherent in the structure and can only be obtained through serious and concerted effort by all involved.

iii Clarification Regarding “Internet Users”/”Non-Contracted Interests” - For the purposes of this document, Internet users that are not registrants have also been referred to as “Non-contracted Internets”. These entities, business’ or individuals, are valued stakeholders that require a voice in the ICANN process. However, these interests are distinct and separate from most others represented within the process due to the lack of legal relationship with the other actors. It is not the intent of this proposal to diminish or redefine this group, but rather to hold them as separate so as to ensure that the interests of those that do have a direct or indirect legal relationship with ICANN are also appropriately dealt with.