

Public Discussion Draft

*Committee on ICANN Evolution and Reform
Recommendations for the Evolution and Reform of ICANN:*

**Further Comments of Tucows Inc.:
Draft Proposal and Request for
Comments Concerning ICANN's Role in
Relation to Contracted Parties**

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Context and Purpose

Tucows is offering a further response to [ICANN: A Blueprint for Reform](#), published on the 20th of June, 2002.

Tucows is in broad agreement with the measures proposed to improve the policy development process outlined in the recommendations of the Evolution and Reform Committee (ERC). Our concerns are not with the recommendations of the ERC; they address the required fundamental improvements to ICANN's structure. In our view, consensus-based decision-making had become a formula for paralysis and protection of the interests of the entrenched incumbents. By asserting the authority of the Board to make decisions, the Corporation will escape, we hope, from some of the futility registrars have experienced in trying to sort out their concerns.

The purpose of this further reply paper is to seek the attention of ICANN reformers to a large blind spot in proposals for reform – practical and timely contractual interpretation and enforcement in the area of generic top-level domains.

Tucows does not pretend to have all the answers or a neat formula that immediately achieves these goals. We put these ideas out for public discussion because we have vital interests in the effectiveness of ICANN. We want ICANN to be able sort out pressing contractual issues so that registrars and registries can get on with the business of registrations and spend less time on fruitless politicking within the organization.

Basic Issue

The basic problem of ICANN, from the point of view of registrars, is that the current structure has proven to be ineffective in dealing with commercial disputes arising from contract enforcement and interpretation in the gTLD space.

This paper makes proposals for how ICANN might conceivably address the problem of contract enforcement and interpretation in regard to gTLDs better than it does now. It does not advance specific solutions at this time, in the belief that many parties and people need to contribute to the formulation of the specific processes needed to support this proposal. It asks ICANN reform process to:

- Expand the focus of reform to consider ways to resolve contractual disputes among contracted parties;
- Elevate the status of contracted parties by recognizing their needs for adjudicatory procedures within the ICANN structure;
- Make appropriate changes within ICANN's staffing and management to accommodate these concepts and procedures.

The Focus of Reform

The focus of ICANN reform efforts has been, if we may summarize rapidly, to

- Find a substitute for elections to the Board
- Get the country codes and root servers properly related to ICANN
- Involve governments more effectively, and
- Break impasses within the DNSO.

We have no issue with this focus, except to say that it is incomplete.

Contractual Issues and Contracted Parties

In our opinion, contracted parties and contractual issues are not adequately separated from policy formulation and provided separate institutional solutions. The focus of ICANN will remain on policy development. The blind spot, as we see it, concerns the absence of provision for contracted parties to sort out their disputes effectively within the ICANN framework. These disputes are at the core of the registration business. They are of intense interest to few parties, such as registrars and registries, and of considerable interest to domain-name registrants.

We do not think that current proposals for fixing the DNSO, or a separate supporting organization (SO) for registrars and registries, will address the problem. We think that current proposals for the GNSO may improve the policy formulation process, but we are less interested in conceiving of these issues as policy and more interested in having ICANN pay special attention to commercial disputes.

We are talking about creating an adjudication process for commercial disputes, and a process of confirmation, referral, amendment, or denial of these adjudications by the Board of ICANN.

There is a precedent for this kind of adjudication in the UDRP, though we do not propose that contract adjudications would necessarily work in the same way.

It would be a key part of this proposal that a party could not stop an adjudicatory process by asserting that a policy issue was raised, with the result that everything would halt, and the issue be tossed back into the GNSO.

It would be a key part of this proposal that ICANN focus on commercial disputes as an important part of its role. ICANN would conceive itself as having two large functions: one, a policy role, using consensus-based processes as much as is reasonable, and the second, acting as a forum for the resolution of commercial disputes among the companies that have been created because of its contracts.

Rethinking the Functions of ICANN

Tucows thinks that there is time between now and September to initiate a dialogue with registrars and registries, and others, about how such an adjudicatory process of contract

dispute resolution might work, and to get concrete proposals ready for the Board's consideration.

It is important that a signal be given that ICANN understands that it is not just in the policy formulation business, but also the regulation – we dare to use the word – to some extent and of some aspects of the industry the DNS and ICANN have brought into being. This contract dispute resolution can be accomplished, but needs careful thought as to how it might be done. Tucows has only gone so far as to say: focus on this. Allow discussion. Consider proposals. Do not think that the current proposals for the GNSO will solve the problems of the registrars and registries.

Here is an analogy. In a software-driven environment such as the DNS, certain inventors and standards setting bodies are creating the aeronautical equivalents of lift, drag, gravity, air pressure and the like. Along come builders and airlines to take advantage of the possibilities thus created. ICANN has licensed businesses to come into being. Now these businesses, operating within rules of the DNS, need to have some manner of sorting out their disputes regarding, say, landing rights – how the industry can work. ICANN can say: “Take these disputes to the ordinary courts of local jurisdiction.” That is far too expensive and not really necessary, when ICANN could set global standards for how the businesses could work, where these standards are desired by contracting parties. It has already set a precedent for IP rights holders with the UDRP.

Now ICANN needs to turn its attention to the needs of its contracted parties.

Actions to be taken

- ICANN should clearly signal that contracted parties in the gTLD space have needs and issues in contract dispute resolution that are not being adequately met in the current structure or reform proposals;
- ICANN should help organize an effort to consider how contracted parties may effectively solve their disputes in adjudication or arbitration within the ICANN structure, which dispute resolution would be subject to the authority of the ICANN Board; and
- Volunteers from registrars, registries and other interested groups who are dedicated to the principle of effective dispute resolution in the gTLD space, and not opposed in principle to this idea, should form a working group and develop proposals along these lines, preferably with the advice, participation or assistance of ICANN Board members who are interested in this issue.