

Under 15 U.S.C. 1525, the U.S. Department of Commerce (“DOC”) should not exercise Joint Project Authority (“JPA”) with ICANN for the IANA transition and should instead follow statutory and regulatory requirements relating to the award of procurement contracts in relation to the delegation of the IANA function away from the National Telecommunications and Information Administration (“NTIA”). The DOC should not be allowed to sole source both the DNS and the IANA functions to the same entity, namely the Internet Corporation for Assigned Names and Numbers (“ICANN”) and should diversify control of the Internet architecture to prevent capture. The IANA functions serve as a key component of the Internet architecture with widespread global impacts. Contract diversity is necessary for a global resource such as the Internet. The U.S. Government, Internet Stakeholders and the Internet Community as a whole cannot afford to allow ICANN or any other single entity to possess both the naming and numbering functions of the Internet where it could fall prey to undue influence by foreign governments or allow such corruption to take hold and control the global Internet resource we all come to rely on in our day to day businesses and personal lives. To do so, would prove catastrophic to governments, the public, businesses and economies worldwide.

As recently seen in the *DCA Trust v. ICANN (.AFRICA)* Independent Review Process, I hope you will find the following quotes as troubling as I do:

*“As set out in Article IV (Accountability and Review) of ICANN’s Bylaws, in carrying out its mission as set out in its Bylaws, **ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws**<sup>1</sup>”*

*“In this IRP, among the allegations advanced by DCA Trust against ICANN, is that **the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness**. In particular, DCA Trust criticizes the **ICANN Board** here, **for allowing itself to be guided by the GAC, a body “with apparently no distinct rules, limited public***

---

<sup>1</sup> Page 41, Article 97. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

**records, fluid definitions of membership and quorums” and unfair procedures in dealing with the issues before it<sup>2</sup>”**

**“ARBITRATOR KESSEDJIAN: So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?”**

**THE WITNESS [Ms. Heather Dryden, former GAC Chair]: I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --<sup>3</sup>”**

**“The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations<sup>4</sup>”**

**“In light of the clear “Transparency” obligation provisions found in ICANN’s Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application<sup>5</sup>”**

**“...the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider<sup>6</sup>”**

---

<sup>2</sup> Page 41, Article 99. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>3</sup> Page 45, Article 104, Witness Testimony of former Government Advisory Committee (“GAC”) Chair, Ms. Heather Dryden. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>4</sup> Page 53, Article 111. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>5</sup> Page 53, Article 113. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>6</sup> Page 61, Article 144. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

**“...the Panel declared that both the actions and inactions of the [ICANN] Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the [ICANN] Articles of Incorporation and Bylaws of ICANN.”<sup>7</sup>**

ICANN has yet to conform to the U.S. Department of Commerce Affirmation of Commitments (“AOC”) and they have had over five years to do so. On the surface, ICANN would desire everyone believe that they are an open, accountable and transparent organization but those who interact with ICANN on a routine basis, understand otherwise. For ICANN to be open, accountable and transparent would subject them to increased liability for their actions or inactions.

In 2002, ICANN purposefully amended their Bylaws to omit any members so that the Board would retain ultimate authority over ICANN. ICANN’s current Bylaws state:

#### **ARTICLE XVII: MEMBERS**

**ICANN shall not have members**, as defined in the California Nonprofit Public Benefit Corporation Law (“CNPBCL”), notwithstanding the use of the term “Member” in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff.<sup>8</sup>

From a governance perspective, this purposeful act concentrated ultimate power in the ICANN Board. Under California Corporations Code §5310, it provides:

(a) A corporation may admit persons to membership, as provided in its articles or bylaws, or may provide in its articles or bylaws that it shall have no members. In the absence of any provision in its articles or bylaws providing for members, a corporation shall have no members.

---

<sup>7</sup> Page 61, Section V, Declaration of the Panel, Article 148. <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>

<sup>8</sup> ICANN Bylaws, Article XVII, Members,

<https://www.icann.org/resources/pages/governance/bylaws-en/#XVII>

(b) In the case of a corporation which has no members, any action for which there is no specific provision of this part applicable to a corporation which has no members and which would otherwise require approval by a majority of all members (Section 5033) or approval by the members (Section 5034) shall require only approval of the board, any provision of this part or the articles or bylaws to the contrary notwithstanding.

(c) Reference in this part to a corporation which has no members includes a corporation in which the directors are the only members.

In corporate “for-profit” entities, the board and the staff powers would be balanced by the legal rights of stockholders, debt-holders, financial disclosures, and other legal remedies not applicable to a non-profit entity. As such, the controversies that have surrounded, and continue to surround ICANN, are based on inadequate corporate governance and accountability mechanisms.

ICANN has yet to demonstrate, in any meaningful way, their ability to conform to the accountability and transparency requirements contained in the AOC other than surface level measures to keep critics at bay and those changes were implemented at a glacial pace. At some point, ICANN’s continuous shielding of accountability and liability will be tested in a court of law as unenforceable. For example, new gTLD applicants must pay \$185,000 USD to apply for a gTLD extension and waive all rights to sue ICANN and the only redress available to applicants is through (1) the ICANN Ombudsman, who reports to and is compensated by the ICANN Board; (2) a Reconsideration Request reviewed by ICANN’s Board Governance Committee (“BGC”); and (3) an Independent Review Process (“IRP”), which is very limited in scope and narrowly construed under ICANN’s Bylaws. In order to have standing to bring an IRP, a new gTLD applicant must prove that an ICANN Board action or inaction violated ICANN’s Articles of Incorporation or Bylaws. ICANN has firmly held the position that new gTLD applicants do not have standing to bring an IRP despite numerous IRP Panels indicating otherwise. The IRP process is extremely expensive (typically in excess of \$1M USD), takes approximately two years to resolve, and is a process which is heavily weighted in ICANN’s favor. Many critics are opposed to the IRP as a viable accountability mechanism since ICANN

views the IRP outcome as merely “discretionary” upon the Board and not “binding” authority.

In the proposed framework for the IANA transition, the ICANN Board has been advised by their outside counsel (Jones Day) to oppose the Sole Member model, as proposed by the Cross Community Working Group (“CCWG”), and push for a “designator” model to continue to shield the Board from liability. Jones Day cites<sup>9</sup> [section 5210](#) of the California Corporate Code, which states:

*Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members, or by a majority of all members, **the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.***

In order for ICANN to become accountable, they must be required to restructure from a California Not for Profit to a California For-Profit Corporation in order to allow community stakeholders, contracted parties and the public to pursue proper legal redress for wrongdoing. Many have already called into question ICANN’s Not for Profit status under the U.S. Tax Code.

Right is right and wrong is wrong. Those that wrong others should be held accountable under established principles of law and not allowed to operate behind a veiled curtain and shielded from liability as a non-profit, especially an entity that controls a global research such as the Internet.

Thank you.

---

<sup>9</sup> <http://regmedia.co.uk/2015/02/09/icann-accountability-jones-day-memo-7feb15.pdf>