

## Comments on the IANA transition and ICANN accountability Just Net Coalition<sup>1</sup>

We comment here on some aspects of both the proposed transition of the supervision of the IANA function currently provided by the United States government, and on ICANN accountability. We comment on both because, in our view, the two issues are linked and must be discussed together.

As stated in our [Delhi Declaration<sup>2</sup>](#): “Existing governance arrangements for the global Internet are inadequate. They suffer from a lack of democracy; an absence of legitimacy, accountability and transparency; excessive corporate influence and regulatory capture; and too few opportunities for effective participation by people, especially from developing countries. The situation can be remedied only through fundamental changes to the current governance arrangements.” This applies also to the management of Internet domain names and addresses, that is, to ICANN and IANA, their accountability, their structure and organization and their relations.

Indeed, as stated in principle 21 of our Delhi Declaration “The laws of any one country or one group of countries cannot control or constitute international technical and public policy governance structures for the Internet. Management of critical resources of the Internet must be internationalised. Current control by one country of the DNS/root zone must thus be replaced by a new transparent, accountable and internationally representative institution responsible for the oversight of critical Internet resource management functions.”

We offer below one possible way forward to achieve that goal. We welcome discussion of this way forward and other possible ways forward.

### Process issues

1. The current approach to the IANA transition was unilaterally established by the US government, with no prior open stakeholder consultations, and it sets preconditions which were not subject to any open discussions. While we welcome a transition away from unilateral US government supervision of the IANA functions, we cannot welcome the unilateral way in which the conditions for the transition have been set, nor the fact that the US government will unilaterally decide whether or not the transition will take place. Non-US governments, organizations and persons cannot be considered to have been consulted or to have consented to this process. Since this matter concerns not only the US but humanity as a whole, it is a violation of the democratic rights of all other peoples if such conditions are decided unilaterally by the US government.
2. Since a possible outcome of this transition is that the IANA functions could be entrusted to ICANN in a more permanent manner, it is not an example of good governance that ICANN itself seems to have been implicitly charged with managing the 'open process with the participation of all stakeholders extending beyond the ICANN community' for 'discussion about mechanisms for guaranteeing the transparency and accountability of those functions after the US Government role ends.'
3. ICANN has issued a Scoping Document, in which it states that “ICANN’s role as the operator of the IANA functions is not the focus of the transition”. This is not acceptable. The

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2 <http://justnetcoalition.org/delhi-declaration>

scope must be agreed through the open consultation process, it cannot be imposed top down by ICANN (even if it was agreed by ICANN and the US government and/or other organizations). Thus the current scope can only be considered to be a draft that is open for comment.

4. The finally agreed scope must allow for discussion of whether or not the IANA function should be performed by one or more separate organizations not related to ICANN.

5. Since there are proposals to maintain the IANA function within ICANN, the discussion of the IANA transition must be closely coupled to the discussion of ICANN accountability.

6. Any group or committee that facilitates or steers the discussions must not include any member of the ICANN staff or of the ICANN Board, in order to avoid the appearance of conflicts of interest. And the secretariat should not be provided by ICANN, again, in order to avoid the appearance of conflicts of interest.

7. ICANN's role at this stage must be limited to facilitating the discussions. In order to avoid the appearance of conflict of interest, ICANN must not review or even comment on the proposals that emerge from the discussions.

8. This transition should be conducted in accordance with the spirit of the Tunis Agenda, which calls for the participation of all governments on an equal footing. The transition must be agreed by all stakeholders, in accordance with their respective roles and responsibilities.

9. There should be a formal discussion and approval process for the transition and ICANN would of course be free to submit its comments during that process.

10. It is important to strive towards a completed transition by September 2015.

### **Substantive issues**

11. The US government has set guidelines for conditions under which its oversight can be transferred to a multi-stakeholder process to achieve suitable accountability and transparency.

12. In a nutshell, it can be said that the issue is how to ensure that there is transparency and accountability for the IANA function operation.

### Historical background

13. The IANA function was initially provided by Jon Postel. A multi-stakeholder group (IAHC) was convened by ISOC and others to propose a long-term solution when the use of the Internet increased greatly, in particular for commercial purposes. That multi-stakeholder group proposed a way forward, the MoU, but that solution was rejected by the US government who instead called for the creation of what is now ICANN.

14. The asymmetric role of the US government has been a source of tension for years, causing much discussion in various forums, including UN agencies. A good academic historical analysis, dating to 2011, is available at:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1744086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744086)

### Issues related to ICANN

15. Additional tensions are caused by the fact that ICANN deals with strings that may have semantic significance and that it is tasked to resolve at a global level issues for which it is difficult to find a global solution (e.g. who, if anybody, should own the top-level domain name “.apple”).

16. While those tensions are not related to the IANA function, which has been performed well by ICANN, those tensions, as well as tensions regarding free speech and censorship have, at times, been brought into the debate on the transition of the supervision of the IANA function.

17. Technical considerations can never be totally separated from normative considerations and the nature of the technical/operational/administrative activities inevitably take place within a larger political/social/cultural/economic context which in turn frames (and influences) the technical/operational/administrative activities and is in turn framed (and influenced) by those activities.

18. There is general agreement that ICANN's current high-level structure (the Supporting Organizations) is not optimal because it is based on vertical silos when in fact many issues are horizontal.

19. There is disagreement regarding whether the US government's current supervision has been material in ensuring that the IANA function performed well.

20. There is disagreement regarding whether ICANN's organic review and transformation processes would be sufficient to result in changes that would, in the long term, ensure that the IANA function continues to be performed well.

#### One possible set of proposals related to ICANN

21. In our view one way forward might be to recognize that the legacy gTLDs (in particular ".mil", ".edu", ".com", and ".org") are in reality US constructs and thus they should be under the authority of the US, who would be free to delegate that authority as it sees fit, including to ICANN. That is, it might be considered that those legacy gTLDs are equivalent to US ccTLDs.

22. Further, countries should be allowed to ask for additional ccTLDs and should be granted additional ccTLDs upon request. In addition, if a gTLD registry and a country want to give a gTLD a status equivalent to that of a ccTLD (similar to the above proposal for ".mil", ".edu", ".com", and ".org"), they should have the right to do so.

23. ICANN should become a membership organization, with the membership having ultimate decision-making authority. The membership would elect the Board and could override any decision of the Board. The membership would consist of all registrants of domain names (that is, holders of domain names) controlled by ICANN, that is, gTLDs (see 21 above).

#### Issues related to the multi-stakeholder model

24. There is general agreement that the multi-stakeholder model should continue to be used, but there is disagreement regarding exactly what sort of multi-stakeholder model should be used. Three types of multi-stakeholder models have been mentioned:

- a) Respective roles and responsibilities as outlined in the Tunis Agenda, meaning that states are responsible for public policy issues.
- b) Equal footing for all stakeholders, including for public policy issues.
- c) Purely advisory role for governments, including for public policy issues, as is the case at present in ICANN.

#### Proposals related to the multi-stakeholder model

25. As noted in 8 above, we are of the view that model (a) should be adopted.

### Issues related to functional or structural separation

26. It is possible to envisage structural separation (which might imply creation of a new entity) for some of the IANA functions.

27. InternetNZ has produced a diagram that clearly outlines the functions and various ways in which they could be grouped or separated, this is at:

<http://www.internetgovernance.org/wordpress/wp-content/uploads/2014-03-ICANN-IANA-Role-Structures.pdf>

28. Various scenarios for the transition have been proposed:

- i. Let the current IANA contract expire and let ICANN continue to perform all the IANA functions. ICANN's existing organic review and reform mechanisms can be used to make whatever improvements are needed.
- ii. Maintain all the IANA functions in ICANN on condition that ICANN's bylaws are drastically revised, for example to make ICANN a membership organization responsible to its members and domicile ICANN in a neutral country such as Switzerland (these proposals are derived from the IAHC MoU). One possibility would be that the membership could be all domain name registrants.
- iii. Create a new entity that would perform the IANA functions. It would be structurally separate from ICANN.
- iv. Create a new entity that would perform the root zone management function. It would be structurally separate from ICANN.
- v. Split the IANA functions as follows: protocol parameters to the IETF Secretariat; IP addresses to the NRO; root zone file management to a new entity; legacy gTLDs to ICANN; ccTLDs to either ICANN or to the new root zone file management entity.

29. In the Affirmation of Commitments, ICANN had promised the US that its headquarters would stay in the US; consequently a move to another country so soon after that promise -- or even serious consideration of it -- might not be appropriate. However, if there were full consensus, including from the US government, then a move to another country would not be problematic.

30. Since the ICANN Board can change the ICANN bylaws, there is no guarantee that functional separation would be maintained if ICANN performs all the IANA functions. Hence it is necessary to link the IANA transition with the issue of ICANN's accountability.

### One possible set of proposals related to functional or structural separation

31. In our view, it should be recognized that ICANN is the economic regulator of the gTLDs. There is no obvious reason to combine this function with the IANA function. Thus we propose consideration of full structural separation as follows (and we reserve our right to submit further proposals based on discussions that will take place).

32. Create a new entity that would perform the root zone management function. It would be structurally separate from ICANN. It would be a Swiss non-profit association, and would request that the Swiss government grant it immunity of jurisdiction. The members of the association would be the domain name registries (both gTLD and ccTLD). The domain name registries would fund this new entity.

33. ICANN would be the interface between the gTLD registries and the new root zone management entity. ccTLD registries would communicate directly with the new root zone management entity.

34. The IETF would decide who should perform the protocol parameters part of the existing IANA function. That could be the new entity of 31 above or any other organization chosen by IETF. The protocol parameter function would be funded by ISOC.

35. The NRO would decide who should perform the IP address part of the existing IANA function. That could be the new entity of 32 above or any other organization chosen by NRO. The IP address function would be funded by the RIRs.