CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community[1]

The Proposal of the IANA Stewardship Coordination Group (ICG) offers a limited space to articulate comments. Keeping in mind the criteria laid down by the NTIA and the limited brief of the ICG in evaluating proposals, the Centre for Communication Governance submits the following comments. We reserve our comments on some issues given the stage at which these comments are being made.[2] However, given the stage at which the IANA Transition process is, we believe the issues raised here are of paramount importance and must be addressed before the proposal is sent to the ICANN board.

Root Zone Management

First, the issue of root zone management has been addressed in a piecemeal fashion and results in ambiguity. The oversight function of the NTIA with regard to the root zone

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[1] The comments have been prepared by **Puneeth Nagaraj** and **Gangesh Varma**, Senior Fellows at the Centre.

[2] These include our comments on the issue of jurisdiction (listed under Work Stream 2), and the legitimacy of the transition process initiated through the unilateral declaration by the NTIA.

once the PTI is created is proposed to be eliminated and this results in ambiguity. The NTIA's role as the (Root Zone Administrator) RZA currently involves

> (a) verifying that ICANN (as the IANA Functions operator) has followed established policies and procedures in processing a change request, and then

> (b) authorizing modifications to data and resources.[3]

According to the ICANN Security and Stability Advisory Committee (SSAC) Report, the NTIA performs its verification function as RZA *inter alia* for root zone changes, registration (WHOIS), Data changes, delegation and redelegation of TLDs. According to this report, "Root Zone Management entails non–trivial and potentially immediate risk to the operation of the Internet as a whole, as it may involve changes to the apex of the public namespace upon which all Internet users and their applications rely"[4].

The ICANN and Verisign in their joint proposal[5] state that the cooperation agreement between the NTIA and Verisign will be replaced by an agreement between ICANN and Verisign, and the need for a Root Zone Administrator (RZA) will be removed. This joint proposal has been developed in an opaque fashion and lacks multistakeholder engagement as it has been kept outside the purview of the ICG with no scope for public comment. The IANA Transition proposal also suggests that post transition, no authorization for root zone changes would be needed[6]. If such an operation is possible, we have a few concerns regarding the NTIA's functions and their changed form after the IANA transition:

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[3] See https://www.icann.org/en/system/files/files/sac-067-en.pdf at pg. 11.

[4] Id.

[5] See http://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf.

[6] See IANA Transition Proposal at pg. 48. Also see http://www.internetgovernance.org/2015/08/18/whats-going-on-between-ntia-icann-and-verisign/.

1) The rationale behind having a RZA with oversight over the IANA functions even after considerable automation in the process was to protect the stability, security and resilience of the Internet by adding a layer of audit and verification for enhanced security and accountability. While the same concerns still exist:

      a) Is there any reason to eliminate the process entirely?

      b) In the absence of an oversight role, Is there a system of checks and balances to review the root zone management?

2) Who will be responsible for oversight over changes to the Root Zone file once the ICANN and Verisign begin to operate it jointly ?

The Verisign/ICANN proposal in response to NTIA's request on root zone administration also calls for a three month period of parallel operation after which the NTIA will hand over the RZM functions to ICANN if the functioning is satisfactory.[7] While the proposal posits that monthly reports on the transition will be published on the ICANN website, NTIA holds the final seal of approval on whether the transition is satisfactory. In this context, we recommend the clear criteria or standards for NTIA's approval in the interests of transparency.

Root zone management is an integral component of the IANA function[8]. Yet, this has been only partially addressed in the proposal. The RZA function and oversight as discussed above requires to be clearly articulated. Further, we see it as critical to the transition, that the agreement or any other arrangement between ICANN and Verisign must be open to comments by the multistakeholder community, and subject to similar qualifying tests as prescribed by ICG.

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[7] Id, at p. 5.

[8] In November 2014 alone, the NTIA received 47 requests for root zone file changes, 30 requests for root WHOIS database changes, and 22 requests for delegation/redelegation of TLDs. See

http://www.ntia.doc.gov/files/ntia/publications/ntias_role_root_zone_management_12162014.pdf

The role of the PTI and ICANN with respect to RZA post transition has already been briefly discussed in the proposal[9], yet the proposal failed to address the transition of the RZA function nor address the oversight concerns which will directly impact the security, stability and resiliency of the network. With the ICANN coming out with a proposal on its own, the role of the community has ostensibly diminished- especially on an important function like RZA.[10] For these reasons, the ICG proposal on RZA is neither complete nor clear.

'Global Public Interest' mandate

Our second concern is with regards to the lack of clarity on the 'global public interest' mandate. This mandate is contained in the articles of incorporation[11], by-laws[12] and the Affirmation of Commitments (AoC)[13] of the ICANN. These fundamental documents refer to acting in 'public interest' as one of the defining ideals of the ICANN. Yet, there appears to be no clarity as to what form such a mandate would carry in a Post-Transition IANA (PTI).

The importance of the term 'public interest' is emphasized by the CCWG's Accountability Proposal which has asked for the retention of Sections 3,4 and 8- of

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[9] See IANA Transition Proposal, at pp. 48-49.

[10] This is especially so since by controlling the RZA, the NTIA had in the past reserved the right to contract with a party other than ICANN for the IANA functions. For this reason, the RZA function post-transition should have some sort of community oversight. See for a discussion, David Post and Danielle Kehl, "Controlling Internet Infrastructure: The IANA Transition and Why it Matters for the Future of the Internet, Part I", https://static.newamerica.org/attachments/2964-controlling-internet-infrastructure/IANA_Paper_No_1_Final.32d31198a3da4e0d859f989306f6d480.pdf at pp. 16-17.

[11] See articles 3 and 7 of the Articles of Incorporation. available at https://www.icann.org/resources/pages/governance/articles-en.

[12] Public interest is one of the "Core Values" of ICANN as per Section 2 in Article I of the ICANN by-laws.

[13] See paragraphs 3, 4 and 9.1 of the ICANN AoC which require that the DNS coordination activities of the ICANN be carried out in public interest.

which Sections 3 and 4 mention public interest, from the AoC in the by-laws.[14] However, there is very little understanding as to what public interest means in the context of the ICANN and PTI functions. The meaning of 'public interest' has been a subject of debate within the ICANN and there has been no consensus on the definition of the term. For example, the Development and Public Responsibility Department within ICANN attempted to define public interest, through the Strategy Panel on Public Responsibility Framework as follows:

> "global public interest in relation to the Internet as ensuring the Internet becomes, and continues to be, stable, inclusive, and accessible across the globe so that all may enjoy the benefits of a single and open Internet"[15].

The Panel report also acknowledges that "there is a need to define particular areas of focus and target topics, regions, and stakeholders that need to be addressed in relation to ICANN's responsibility to serve the global public interest."[16]. As evidenced by the GNSO session during ICANN 52 Meet in Singapore[17] achieving a consensus on a definition of 'public interest' has been difficult due to multiplicity of parameters and variation in conception, yet without some framework or guidelines, the public interest mandate would be meaningless.

Since the ICANN bylaws will remain largely unchanged through this transition process, clarifying the meaning of a 'core value' of the ICANN is important. This would also be consistent with the NTIA requirement for the transition process, that the ICG proposal must support and enhance the multistakeholder model. Clarifying the meaning of such a critical term will strengthen the multistakeholder engagement as the various stakeholders will be then be presented with a clearer standard against which they may evaluate the public interest considerations of their actions.

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[14] CCWG- Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, at p. 72.

[15] See https://www.icann.org/en/system/files/files/prf-report-15may14-en.pdf at pg. 4

[16] Ibid.

[17] See https://singapore52.icann.org/en/.../tue.../transcript-ncuc-10feb15-en.pdf.

While the work of the Strategy Panel on Public Responsibility Framework will help infuse public interest ideas in the functioning of the ICANN, at the stage of transition it needs to be supplemented by a more clearly articulated understanding of the term 'public interest' at the level of the ICANN Board, the communities, and in oversight bodies like the CSC and IFR. Our request here is that the ICG could consider the scope of the 'global public interest' mandate at the board level and identify its possible implications for the PTI and the supporting and advisory organizations.

Contracting between ICANN, PTI and Communities

Third, it is unclear as to who the communities will contract with once the PTI is formed. Currently, the three communities contract directly with the ICANN. Once the transition is completed the proposal is ambiguous about whether the communities' contract with the PTI or the ICANN. While the names community proposal suggests contracting with a newly created entity i.e. the PTI, the numbers and protocols community proposals suggest continuing to contract with ICANN. The overall proposal does not clearly specify whether the ICANN is expected to sub-contract to the PTI. This could possibly result in discordance in the IANA functions. Furthermore, if ICANN were to sub-contract the IANA functions to PTI, the mandate should clearly express such requirement. From a governance point of view, clarity is required to attribute responsibility for the functions that would rest with either the primary or secondary contracting party. This also affects the interoperability of the proposal.

The issue of contracting also affect the nature of power exercised by the ICANN in the management of the DNS as the IANA Functions Operator (IFO). In view of the possible lack or primary responsibility on ICANN and the lack of external oversight measures a clearer exposition of the contracting structure is required.

Annexure I

ICG Questions:

Questions concerning the proposal as a whole

1.Completeness and clarity: Is the combined proposal complete?

We believe the proposal is neither complete nor clear. First, there needs to be a better understanding of the meaning of public interest. Second, there needs to be greater clarity around RZA functions, the transition of the RZA functions and whether there will be some sort of oversight. For these reasons, the ICG proposal fails the first requirement.

2. Compatibility and interoperability: Do the operational community proposals work together in a single proposal?

We believe that the proposal does not work together as a single proposal and each community's proposal continues to remain significantly disjunct from the other. This is with particular reference to the fact that although at this point it is unclear, it appears that the numbers and protocols community wishes to contract with ICANN while only the names community is open to contract with the PTI. Further there is also ambiguity in the reason and rationale behind the contracting structure.

3. Accountability: Do the operational community proposals together include appropriate and properly supported independent accountability mechanisms for running the IANA functions?

Our comments on the CCWG proposal discusses some of the issues related to accountability in greater detail. In the present proposal, without a clear understanding of the meaning of public interest, the contracting relationship with the communities and the oversight mechanisms of the RZA functions, the proposal fails on accountability. The question of whether PTI or ICANN contracts with the communities is crucial from an accountability perspective. If ICANN were to sub-contract the function to PTI it would

effectively reduce ICANN's accountability to the communities. Which is why there should be greater clarity on these issues.

4. Workability: Do the results of any tests or evaluations of workability that were included in the operational community proposals conflict with each other or raise possible concerns when considered in combination?

We do not believe that the three community proposals collectively work as one as there are differences in the community proposals that need to be overcome. As the names community has pointed out and we have discussed above, it is unclear as to who the communities will contract with for IANA functions PTI. Further, on the question of jurisdiction, the protocols community seems to have a different view from the other two. While we do reserve our comments on jurisdiction for this round, we believe the lack of consensus between the communities on this question is problematic from a workability perspective.

Annexure II

Questions Concerning NTIA Criteria

1. Do you believe the proposal supports and enhances the multistakeholder model? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

Yes. The proposal supports a model stakeholder model. However, it is important to note that the view there is a single multistakeholder model that is applicable across institutions is contested. The multistakeholder model adopted by the ICG through the transition must be subjected to strict standards of openness, transparency, and accountability. These aspects would be discussed in the CCWG Accountability Proposal and therefore we reserve our detailed comments for the CCWG Accountability Proposal.

2. Do you believe the proposal maintains the security, stability, and resiliency of the DNS? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

No. The security, stability and resiliency of the DNS among other factors is dependent on integral aspects like root zone management which have not been adequately dealt with in the proposal. We suggest that the ICG may recommend to the NTIA that the parallel process on the ICANN/Verisign Proposal be open to public comment. Further, we also recommend to the NTIA that the parallel process be integrated within the Transition proposal and therefore, include the ICANN/ Verisign proposal within the scope of a new expanded mandate of the ICG. This could possibly address many issues that were left out of the scope of discussions, including further globalization of the concerned institutions and the root zone management.

3. Do you believe the proposal meets the needs and expectations of the global customers and partners of the IANA services? If yes, please explain why. If not,

please explain why and what proposal modifications you believe are necessary. Please indicate if you are a customer or partner of the IANA services.

No. Insufficient clarity on contract between the respective communities and the ICANN or PTI would result in lack of accountability in addition to poor operationalization of the IANA functions. The nature of contract would also directly affect the consumer's right against the service provider which in this case lacks clarity. We are not a customer or a partner of the IANA services.

4. Do you believe the proposal maintains the openness of the Internet? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

No. The proposal does not indicate clear details on Root Zone Management, which is essential to the realization of a free and open internet. Defining the scope and meaning of the public interest mandate of ICANN also goes some way in aligning the IANA functions in a manner that maintains the openness of the internet.

5. Do you have any concerns that the proposal is replacing NTIA's role with a government-led or inter-governmental organization solution? If yes, please explain why and what proposal modifications you believe are necessary. If not, please explain why.

No. The proposal clearly does not result in a government-led or inter-governmental organization. The only concern raised is the role of the Governmental Advisory Committee (GAC). As this is extensively discussed in the CCWG Accountability Proposal, we exclude our observations from this comment.

6. Do you believe that the implementation of the proposal will continue to uphold the NTIA criteria in the future? If yes, please explain why. If not, please explain why and what proposal modifications you believe are necessary.

No. The inherent ambiguity in the proposal and its operation as discussed above can result in the abuse of multistakeholder models, and inefficient functioning of the DNS.

Questions Concerning ICG Report and Executive Summary

7. Do you believe the ICG report and executive summary accurately reflect all necessary aspects of the overall proposal? If not, please explain what modifications you believe are necessary.

Yes. While the ICG report reflects all aspects of the overall proposal, it fails to do justice to the larger objective to transferring the oversight mechanism to a global multistakeholder community. The ICG report due to its restrictive mandate has not discussed the management of the Root Zone completely. By excluding the ICANN/Verisign proposal from public comment and multistakeholder deliberations, the process fails to address a highly controversial yet crucial aspect of the transition. Further the report while briefly touching upon the issues of jurisdiction without offering detailed discussions has only highlighted the lack of consensus between the Protocol Parameters community and the Names and Numbers Communities on this aspect.

General Questions

8. Do you have any general comments for the ICG about the proposal?

We appreciate the open, transparent and consultative process adopted by the ICG. We also recommend that the ICANN/Verisign proposal for Root Zone Management be open for comment and consultation in a similar fashion. While this is seemingly outside the scope of the ICG, the implications for the DNS and its security, stability and resiliency warrant the inclusion of a holistic discussion of the management of the root zone.

Further we note with interest that the NTIA has decided to extend the term of its contract with ICANN. This gives an opportunity for the proposals to be further negotiated and issues ironed out before submission as a consolidated proposal to the NTIA. This means timeline for transition must be modified. However, such modification of the timeline must not result in an indefinite delay of the transition process. It must also be cautioned that the transition process should prevent new structures put in place from limiting the scope of the greater globalization of the institutions involved and further continuous improvements on accountability through Work Streams.