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Submission ID: 19

Please find attached a political comment from the Just Net Coalition regarding the proposed IANA transition plan. Please note that this only addresses the question 12 inviting general comments.

 We are submitting separately a technical comment.

Parminder Jeet Singh

for the Just Net Coalition

http://justnetcoalition.org/

IANA Stewardship Transition Proposal - Public Comment Form

Disclaimer: The ICG will not use the information collected for any purpose other than analyzing public comments. Submitters' names, affiliations, and comments will be public.

Identifying Information

* Indicates required field

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Email Address *

Country/Economy: Kenya and Switzerland

Organization: Just Net Coalition

General Questions

This comment is submitted on behalf of the Just Net Coalition[1] (JNC) which comprises several dozen civil society organizations and individuals from different regions globally, concerned with issues of Internet governance, from the perspective of all human rights, including democracy and economic and social justice.

We have responded separately to the other structured questions posed by the ICG.

> ### Question 12. Do you have any general comments for the ICG about the proposal?

As explained in more detail below, the IANA Transition process is fatally flawed, for the following reasons:

1. It was not legitimate for the US to decide unilaterally what process to use for the transition to what should be the political oversight of ICANN in a structure adequately representative of the global public, along with the necessary techno-administrative changes.

2. The chosen process is not legitimate.

3. The outcome of the process is not acceptable and does not reflect a sufficiently broad consensus, nor does it transition ICANN oversight to the global public, along with the necessary techno-administrative changes.

4. It is further not legitimate for the US to decide unilaterally whether the outcome is or is not acceptable.

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[1]

   http://justnetcoalition.org

Points 1, 2 and 4 above relate to violations of the principle of democracy, that is, to the right to take part in governance decisions either directly or through freely chosen representatives.[2] Non-US citizens cannot take any part in decisions made by the US government, so those decisions should not determine the outcome of what is clearly an issue that has global implications.

Point 3 above is developed in more detail below. In a nutshell, the proposal empowers a set of ICANN insiders, largely working in the interests of US-based and allied businesses,[3] to control what is a global public resource. Meanwhile the US in any case retains all the political oversight that it would ever need over ICANN through its jurisdictional control. This is not acceptable.

To summarize, we reject the transition proposal *in toto.*

Without prejudice to that overall rejection, explained below, we have responded separately to the structured questions posed by the ICG.

The process fails to achieve its basic geopolitical objective

What has been called the IANA transition process is in our view fundamentally flawed, as it flows from some illegitimate political interests and focuses on protecting them. These interests are primarily those of the US government that intransigently refuses to give up its unilateral political oversight over what has emerged as perhaps the most important global infrastructure today.[4] These interests are in nexus with commercial interests of global business, much of it US-based; it is this combination of interests that has driven the process; and, predictably enough, the results of it simply serve them.

The IANA transition should basically have been about shifting from, what in the current circumstances is, illegitimate and unacceptable unilateral political oversight by the US over the Internet's technical and logical infrastructure (see the Tunis Agenda of the World Summit on the Information Society, or WSIS) to legitimate political oversight by the global public. However, the process seems to have been rigged and closely chaperoned from the beginning toward what apparently are predetermined outcomes, with minor room left here and there to fill in details, as possible variables, but with no option to introduce any structural changes. Whereas, being the central Internet-related geo-political controversy since the early WSIS days, structural changes to ICANN oversight should have been the real objective and outcome of this process. What we now have is mere eyewash and, to the extent that it is being projected as a structural change that was the long-standing global demand, it can be considered instead a step backwards.

Let us first make clear what were our expectations for the process.

1. Any technical policy making – which indeed can be done by a narrow group of experts and/or immediately involved 'stakeholders' – requires appropriate political oversight that is fully representative of the concerned (larger) public.
2. In the case of ICANN, such political oversight should be representative of the global

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[2]

     See article 21 of the Universal Declaration of Human Rights

[3] An overall analysis of the issues can be found at:
http://www.theregister.co.uk/2015/08/04/removal_us_government_from_internet_control/

[4] http://www.huffingtonpost.com/carl-bildt/who-govern-internet_b_7922948.html

public. An appropriate structure must be evolved in this regard. It must be configured in an arms-length manner to avoid ad hoc political interference.

3. This first of all requires that ICANN cannot be answerable to jurisdiction of the US. It must be incorporated under international law, with appropriate jurisdictional immunities.

We tend to understand the fear of direct inter-governmental oversight, which of course was expressly excluded by NTIA's[5] framing conditions. However, there have been proposals on the table that provided alternative ways of representing the global public.[6] Proposals along those lines were presented to the process, including by an official advisor to the process, but given no heed.

The current final proposals on the table fail on all the above counts. We therefore suggest that these be rejected out of hand by all right-thinking parties, and that effort be renewed toward finding a genuine solution to this long-standing problem of US unilateral oversight of ICANN. Accepting, even as an interim solution, something that does not address, at all, the key issues will only set back the political process of resolving the very important question of appropriate globally-democratic ICANN oversight.

Just removing NTIA from the root zone change authorization process achieves little. The US government's judicial, legislative, and some important executive agencies, retain complete jurisdiction over ICANN's processes and decisions. What happens when one of these agencies asserts its right to influence ICANN's processes and decisions – something that is bound to happen sooner or later – is a question that is never answered. Pivotally, it has not been answered in the current process, even though it was raised repeatedly, including by some advisors officially appointed to the process.

A process with glass walls, underground tunnels and invisible hands

Having not addressed what was the principal objective of the 'transition' – the issue of political oversight of ICANN, which centrally includes the jurisdiction issue – the IANA process cannot be evaluated to have succeeded nor on subsidiary issues/elements. In fact one of the biggest defects of the process (whether deliberate or not) was that it did not follow the normal process of dealing with issues in an appropriately hierarchical manner, as is logical, especially for political issues that involve distribution of power. While key, hierarchically-higher issues were still open, the process would rush to sort out lower level details, sometimes right down to absurd minutiae, and work hard to come out with solutions. These decisions on details would then by default constrain and thus decide the higher hierarchical issue in a particular manner. We saw this happen again and again throughout the process, which thus left us completely dissatisfied with the process, as much as with its result.

The whole process was so tightly and opaquely 'controlled' that it can serve as a useful case study about how an apparently 'open process' can turn out to be much worse than an institutionalized and, to that extent, constrained/closed process. Turning out a pre-determined result is something more associated with closed or semi-closed processes. However, in this particular case it was its openness and non-institutionalized form that was 'innovatively' used, whenever required, to turn

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[5] the National Telecommunications and Information Administration, the cognizant agency of the US government
[6] See for example http://content.netmundial.br/contribution/democratising-global-governance-of-the-internet/164

the process toward directions that were considered suitable by the 'invisible hands' (though also not all that invisible). The 'openness' of the process meant that, whenever it suited the 'invisible hands', a process was forked, new processes were instituted, and so on, all at a bewildering pace. Most of it seemed to get done in the name of the 'community,' which ghost rented the entire space and process, even when there was never an adequate response to the question "what is the community?", a question that some of us did ask repeatedly.

Refusing to answer clearly the question 'what is the community?', when everything seemed to get done in its name, is even more surprising when at many other points the process became ludicrously legalistic and precise, often in pursuit of what appeared to be deliberate complexity. Whenever a knotty political issue cropped up, heavy complexity got thrown at it 'til things reached a point where only those who were in a position to employ considerable committed resources could remain tuned. Subsequently – after applying the 'exclusion by required time / human resources method' – some detailed solutions for the matter were hammered out. This more than anything else contributed to foreclose the hierarchically-higher political issue that had been the original problem.

Complementing this kaleidoscopic play with 'openness' were several more brazen intrusions into the process by the two primary interested parties. It was never explained how a party which had such a deep interest in the outcomes, namely ICANN (there was considerable demand that the final process should come up with strong checks on ICANN – indeed the whole process was about oversight of ICANN), could be entrusted with conducting the process of developing recommendations for IANA transition. Throughout the process, whenever discussions tended toward certain 'uncomfortable' directions, one would hear rumors of ICANN's displeasure etc.; and, magically, things would turn away toward 'more comfortable' directions, even if taking some torturous, basically time-consuming steps, trying to make the shift look relatively logical. But the end was always very predictable – things moved in the direction that ICANN was comfortable with.

Similar things happened with regard to the other (bigger) principal in the process, the US government. Statements were frequently received about what the US wants or does not want, from congressional hearings, speeches of key government officials, and so on. And the process would immediately take the cue. One good example of how the whole process worked on 'unstated orders or interests' was the manner in which the ICANN's jurisdiction question was simply never considered in any appropriate length and depth. This, even though keeping ICANN in the US jurisdiction was not among the initial framing conditions that NTIA laid for the process.

Complete arbitrariness in process-related decisions, and deliberate complexity in conducting the process, were two complementing methods exercised right from the start. It first became clear when the globally recognized geopolitical issue of 'ICANN oversight' was disingenuously presented as a technical issue about managing the root zone. This gambit was further compounded when the various involved committees were almost fully stacked with ICANN insiders, whereas it was actually the global public outside ICANN that needed to be consulted on proper political oversight of ICANN.

As it proceeded, the main process got suddenly forked, creating a different line for ICANN accountability. This in itself carried a very strong suggestion, almost a confirmation, even before the matter was officially decided, that ICANN would indeed be given the IANA function, or rather oversight over itself, which is really no oversight. (Even while, as explained above, the US retains all the political powers that it would ever need in order to be able to, for example, remove a country's country-code top-level domain name from the Internet.) Any hope of the transition process resulting in any kind of genuine international oversight was already as good as dead by this stage.

If anything could still get past this rather impregnable defensive formation, it would immediately run into the all-powerful legal teams (paid by ICANN) who promptly filled up any possible remaining spaces that could even remotely look like providing some chance to move toward a politically effective direction. And the legal views were more or less final, contributing to the method or stratagem described earlier of detail being more important than structural issues. Throughout, US legalese triumphed over what was supposed to be a geo-political discussion, process and outcome.

It also requires mentioning here that even within such a tightly controlled environment, the discussions that constituted the process were so overwhelmingly dominated by Northern actors, by far most of them from the US, that it does not carry even *prima facie* legitimacy. Making the excuse that the process was open to anyone to join more than anything else simply serves as an indictment of what the process really was!

It may be a step backwards

Significantly, not only has the process failed to transition political oversight of ICANN from the US to the global public, it has dangerously left ICANN in a situation where it is even less accountable than it was before. With ICANN dominated by the domain name and other interested businesses, this is not a tenable situation. US oversight at least created some semblance of a political back-stop and therefore accountability. A few years back the US government refused to accept ICANN's decision to let Verisign increase the prices for .com registration. Where is such a check now? There have been a number of other decisions by ICANN that seemed to have no better purpose than to improve its own bottom-line at the expense of the public. Left with no real oversight in the current proposal on the table, we fear that ICANN would become even more commercial-minded, in its own interests and in those of closely involved businesses, at the expense of the larger public interest.

The currently proposed accountability processes only involve a relatively tightly-knit ICANN community. While such an arrangement may have some use in checking any brazen misuse of power by the ICANN board, it will have no effectiveness in addressing larger structural problems to ensure that ICANN works in the global public interest, rather than just the interest of a small set of actors closely involved with ICANN.

The current proposals therefore achieve nothing, and may even have significant negative consequences. We therefore reject them i*n toto*. Further, we are greatly disappointed by the manner in which the whole process has been conducted, which serves to reduce further any

confidence that one might have had in ICANN's being able independently to manage the technical and logical aspects of this most important of global infrastructures.

The US retains all the oversight that it needs over ICANN; and ICANN insiders, to a good extent working for US business interests, retain their very advantageous control over ICANN. It is a win-win for these two parties, which is hardly surprising since these two parties completely controlled the whole 'transition process'. There were minor co-optations here and there, which were embarrassingly few and weak. It is a perfect case study of control structures with glass walls, underground tunnels and invisible hands, which is what the so called 'open process' really turned out to be.

In sum: the US seems to have agreed to leave the full range of ICANN's policy and administrative activities to the clique of ICANN insiders, without any effective accountability, in exchange for the latter's continued acceptance or non-questioning of the US' jurisdictional control over ICANN, which is enough to serve US political purposes. The whole process appears to be a fixed match between these two parties, as the rest of the world stood by and watched.

We therefore appeal to all parties, especially civil society groups and non-US governments, to fully reject these proposals. They go against all democratic norms, and they endanger their political interests (meaning that of the publics that they represent). Even a partial or qualified acceptance of these proposals will greatly set back the long outstanding, and increasingly urgent, geo-political demand and effort for democratizing the governance of this key global infrastructure.

These are our main political points. Since some of us had the opportunity to observe the process, we critique in a separate submission many points about the details of the process, as per the format of the questionnaire that has been provided. However, as said above, we reject both the process and its outcomes *in toto*, and our detailed points merely attest to our larger conclusions described here.