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Submission ID: 18

Please find attached a technical comment from the Just Net Coalition regarding the proposed IANA transition plan. We are submitting separately a political comment.

Richard Hill for the Just Net Coalition

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

First Name * Richard

Last Name * Hill

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Country/Economy: Kenya and Switzerland

Organization: Just Net Coalition

Questions Concerning the Proposal as a Whole

This comment is submitted on behalf of the Just Net Coalition[1] (JNC) which comprises several dozen civil society organisations 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 submitted a separate comment that explains in some detail why, in our view, this entire process is fatally flawed and unacceptable. In addition, we respond here to the structured questions posed by the ICG.

1)   Completeness and clarity: Is the combined proposal complete? Each of the operational community proposals contains aspects to be completed in the future when the proposal is implemented. Is the combined proposal specified in sufficient detail such that it can be evaluated against the NTIA criteria?

No, the combined proposal[2] is not complete, because, as stated in question 1 above, two of the operational community proposals are not complete. The missing parts of the proposals are essential elements and it is not possible to evaluate properly the "combined proposal".

The addressing proposal cannot be evaluated until the SLA referred to in that proposal (see paragraph 66 of the combined proposal) is agreed, because many elements that are critical to the IANA functions for addressing will be specified in that SLA. We associate with the detailed criticism found at: http://forum.icann.org/lists/icg-forum/msg00020.html

The names proposal is not complete because the issue of the intellectual property rights associated with the IANA function (IANA trademark and "iana.org" domain name) is not resolved in that proposal, see paragraphs X013, 35, and 65 of the combined proposal.

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1 http://justnetcoalition.org
2 https://www.ianacg.org/icg-files/documents/IANA-stewardship-transition-proposal-EN.pdf

Further, we associate with the criticism[3] of the names proposal presented at:
 http://mm.ianacg.org/pipermail/icg-forum_ianacg.org/2015-June/000001.html

CWG-Stewardship has itself admitted[4] that there were opposing views regarding the names proposal, so the final version reflects consensus of CWG-Stewardship, not necessarily broad consensus of the global multistakeholder community.

And the key issue of maintenance of the root zone file is not addressed, see paragraphs X016, 41 and 55 of the combined proposal.

Fundamentally, the proposal as a whole is not ready for implementation, because of the various incomplete aspects mentioned above. Thus it would be premature to submit the proposal to NTIA, because NTIA requested[5] that the proposal as a whole be ready for implementation.

2)   Compatibility and interoperability: Do the operational community proposals work together in a single proposal? Do they suggest any incompatible arrangements where compatibility appears to be required? Is the handling of any conflicting overlaps between the functions resolved in a workable manner?

As the ICG itself has noted in paragraphs X013 and 35 of the combined proposal, the issue of the IANA trademark and the "iana.org" domain name has not yet been resolved. This is a material issue that must be resolved before the combined proposal can be properly evaluated.

3)   Accountability: Do the operational community proposals together include appropriate and properly supported independent accountability mechanisms for running the IANA functions? Are there any gaps in overall accountability under the single proposal?

According to the NTIA's original announcement[6], its intent was "to transition key Internet domain name functions to the global multistakeholder community[7]". The proposal does not achieve this goal. On the contrary, it transitions the key Internet domain name functions to an organ that is dominated by one stakeholder group: industry that is involved with domain names and

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[3] And we note that, contrary to established practice in ICANN, the final CWG-Stewardship proposal was not published for public comment before being adopted. And this despite the fact that CWG-Stewardship has publicly stated that it is common practice in an ICANN context to publish a final proposal for public comment when substantive changes are made to the draft proposal, which was the case here. The CWG-Stewardship statement is at: http://mm.ianacg.org/pipermail/internal-cg_ianacg.org/2015-August/001334.html (note that it is couched in the negative, that is, *a contrario*).

[4] See http://mm.ianacg.org/pipermail/internal-cg_ianacg.org/2015-August/001334.html

[5] http://mm.icann.org/pipermail/internal-cg/2015-February/003020.html

[6] http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions

[7] We consider the term "global multistakeholder community" used by NTIA as a biased and inexact representation of what is more properly called as the global public. However, since this is the term used in the IANA transition process, we will continue to use it in our submission but with the stated reservation.

addresses. This can be seen from paragraphs 307-314 of the proposed changes to ICANN's bylaws and structure[8].

We associate with the comments found at: http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/msg00018.html

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?

The proposals from the operational communities do nothing other than to enshrine the status quo. Thus, from an operational point of view they are workable. But, as noted above, that was not the purpose of the exercise. The purpose of the exercise was to replace NTIA's oversight of the IANA function with oversight by the global multistakeholder community. That goal is not attained by the proposal. So, in that sense, the overall combined proposal is not workable.

Further, the names proposal is not workable. it can be characterized as "much ado about nothing": it uses many pages of very detailed text to enshrine the status quo, apart from accountability changes mentioned in paragraph 1106. PTI will be fully controlled by ICANN, so there is no meaningful separation and no real change with respect to the current situation. In particular, there will be no change in jurisdiction (see paragraph X005 and 07), so PTI will be subject to US law, as is the case today for the IANA function. This means that, in effect, the United States maintains its asymmetric role with respect to the management of domain names and addresses (PTI would have to obey US court orders and US laws), thus negating the objective of internationalizing the management of Internet domain names and addresses.

The lack of meaningful separation between ICANN and the IANA functions operator is a fatal flaw in the names proposal. In addition, we associate with the detailed criticism of the names proposal found at: http://mm.ianacg.org/pipermail/icg-forum_ianacg.org/attachments/20150625/3459ce38/attachment.pdf

Worse, the proposals regarding improving accountability are such that it would be essentially impossible for ICANN to move outside of the USA[9]. This is not acceptable.

Questions Concerning NTIA Criteria

5)   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.

No, the proposal does not support or enhance the multistakeholder model. The proposal transitions oversight of the IANA function from the US government to ICANN constituencies which are dominated by the domain name and address industry. That industry is a small part of the global multistakeholder community. Worse, the ICANN processes are typically heavily influenced by a small clique of insiders who represent the interests of companies active in the

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[8] See the report of CWG-Accountability, at https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf
[9] See paragraphs 242 ff. of the report of CWG-Accountability, at https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf

domain name and addressing business in one way or another. This is the opposite of supporting and enhancing the multistakeholder model.

Further, the governance mechanisms envisaged in the proposal are not consistent with the multistakeholder model outlined in the Tunis Agenda, and this because in the proposal governments would not be able to exercise their proper role and responsibilities regarding public policy matters: they are relegated to a purely advisory role within ICANN[10] and consequently cannot have an appropriate oversight role regarding the IANA function.

6)   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 proposal does not maintain security, stability and resiliency of the DNS. On the contrary, it gravely threatens resiliency because the domain name and address industry is given a dominant role, without adequate checks and balances. And it threatens stability because many states are likely to consider that it threatens their national interests for the DNS to be unilaterally overseen by the domain name and address industry, so they may make arrangements for alternative DNS resolution systems.

Further, the "casting in stone" of the USA as the seat of ICANN[11] and the IANA function may be unacceptable to many states. This threatens stability and resiliency because it gives the US Congress the ability to pass laws that would directly affect the management of the DNS: since ICANN and the IANA operator would be based in the USA, US courts would issue orders that would be easily enforced.

7)   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. As we have indicated previously, the actual customers and partners of the IANA services should exercise oversight through the well-known and well-proven mechanism of being members of the organization that provides the IANA function. All comparable organizations are membership organizations (in the true sense of the concept, not the degenerate one-member version proposed for ICANN), so there is no valid reason not to adopt such a structure. We reiterate our proposal[12] in this respect.

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[10] Note also that, at a US Congressional hearing, the ICANN CEO made it clear that the GAC will remain a purely advisory body. See 1h17' of the video stream at: http://energycommerce.house.gov/hearing/internet-governance-progress-after-icann-53

[11] See paragraphs 242 ff. of the report of CWG-Accountability, at https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf

[12] http://forum.icann.org/lists/icg-forum/msg00009.html

8)   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 maintain the openness of the Internet. As noted above, it hands oversight of the IANA functions to the domain name and address industry, which is not representative of the global multistakeholder community. We, and others, have repeatedly pointed out what needs to be done, and the proposal should be modified accordingly: there must be true separation of the IANA function from ICANN, governance should be performed through a membership structure, and the IANA function must not be under US jurisdiction (ideally it would be immune from any national jurisdiction, alternatively it could be in a jurisdiction whose government and parliament are less likely to intervene). We have already submitted specific proposals[13].

9)   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.

The proposal perpetuates the asymmetric role of the USA, because it obliges ICANN and the IANA function to remain in the USA and to be subject to US laws and US courts. The goal of transitioning oversight to the global multistakeholder community is not met.

Indeed, even if NTIA's direct role is removed, the US government has full jurisdictional and legislative authority over ICANN and the IANA operator. Therefore, the proposed transition fails fully to remove the US government from oversight of ICANN and the IANA function.

10)   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, as noted above the solution will not uphold the NTIA criteria.

NTIA clearly asked for oversight to be transitioned to the global multistakeholder community. However the current proposal envisages no, or a weak, role for the global community as such, because governance of ICANN and the IANA operator will be dominated by ICANN constituencies, that is, by the ICANN community which is dominated by the domain name and addressing industry.

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[13] http://forum.icann.org/lists/icg-forum/pdfXXrCnTxCwW.pdf

Therefore contrary to the key NTIA requirement, oversight would not be transitioned to the global multistakeholder community.

Questions Concerning ICG Report and Executive Summary

11)   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.

No, the report and executive summary do not accurately reflect all necessary aspects. As noted above, they gloss over the incompleteness of the proposals from two of the operational communities. And they fail to do justice to two key issues: (1) the jurisdiction in which ICANN and the IANA function should be located and (2) what will happen regarding operation and maintenance of the authoritative root zone file.

The ICG correctly states in paragraph X009 that each of the proposals from the operational communities achieved consensus according to the rules of those communities. But if fails to note that that does not necessarily indicate that the proposals had broad support from the global multistakeholder community, which is an NTIA requirement[14].

The IETF held that its proposal achieved "rough consensus". "Rough consensus" is a term of art within IETF and it cannot be compared to the common use of the term "consensus". Thus "rough consensus" within IETF cannot be equated to consensus (or even broad support) of the global multistakeholder community.

As explained in more detail in the response to question 12 below, the names and addresses proposals achieved consensus within the groups chartered to prepare those proposals, but those groups were not fully open. So consensus within those groups cannot be equated to consensus (or even broad support) of the global multistakeholder community.

Further, the ICG violated its own rules[15] by publishing the names proposal before the relevant group, CWG-Stewardship, had an opportunity to address an objection[16] sent directly to the ICG and forwarded by the ICG to CWG-Stewardship. Worse, the ICG co-chair sent the ICG views[17] regarding that objection to CWG-Stewardship before the CWG-Stewardship considered them. We associate with the cited comments at: http://mm.ianacg.org/pipermail/icg-forum_ianacg.org/2015-August/000003.html

General Questions

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[14] http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions
[15] https://www.ianacg.org/icg-files/documents/Community-Comments-Handling-1May15-final.pdf
[16] http://mm.ianacg.org/pipermail/icg-forum_ianacg.org/2015-June/000001.html
[17] http://mm.ianacg.org/pipermail/icg-forum_ianacg.org/2015-August/000003.html

12)   Do you have any general comments for the ICG about the proposal?

This entire process has been flawed from the start, because it was based on a unilateral decision of the US government. The NTIA did not seek public comment regarding its proposal for the transition. If there had been public consultation, then perhaps some people might have pointed out that it might have been better to avoid mandating ICANN to organize a process whose outcome could, in principle, materially affect ICANN. This is not purely a theoretical consideration: some of the proposed transition measures could affect ICANN.[18] It is manifestly inappropriate to expect an interested party, ICANN, to run a process that is supposed to be open and impartial.[19] Further, the US government intervened during the process.[20]

And the process will be fundamentally flawed at the end, because the final decision regarding whether or not to adopt a proposal will be made unilaterally by the US government.[21] For sure the US government will evaluate whether or not, in its view, there is broad support from the global multistakeholder community, but, given the historical background[22], it is not appropriate that the US government makes a determination of whether or not there is consensus for a particular proposal.

Further, while the IETF process for the IANA transition was fully open, the same is not the case for the ICANN processes dealing with names and accountability, nor for the NRO process dealing with addresses.

ICANN created cross-community working groups, whose members were selected by ICANN. Other people could join the group, but as participants, not as full members. Some think that the distinction is not significant, but we disagree. Under ICANN's rules, only members have full

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[18] See for example
 http://www.internetgovernance.org/2015/06/28/the-iana-trademarks-the-transition-puzzle-piece-that-refuses-to-fit/
http://www.internetgovernance.org/2015/06/04/power-shift-the-ccwgs-icann-membership-proposal/

[19] For examples of how this created at a minimum an appearance of conflict of interest, see:
http://www.internetgovernance.org/2015/05/07/the-gulf-of-tonkin-icann-board-responds-to-monopoly-allegations/
http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfXMRLCzslox.pdf
http://mm.icann.org/pipermail/accountability-cross-community/2015-July/003835.html
http://mm.icann.org/pipermail/accountability-cross-community/2015-July/003864.html
http://mm.icann.org/pipermail/accountability-cross-community/2015-July/003896.html
http://mm.icann.org/pipermail/accountability-cross-community/2015-July/003959.html
http://mm.icann.org/pipermail/accountability-cross-community/2015-July/003960.html

[20] See for example
http://www.ntia.doc.gov/blog/2015/stakeholder-proposals-come-together-icann-meeting-argentina
http://www.internetgovernance.org/2015/06/22/icann-accountability-present-future-and-past/#comment-40234
http://www.ip-watch.org/2015/06/22/experts-debate-iana-transition-designing-in-a-straitjacket-or-securing-stability/

[21] See http://mm.icann.org/pipermail/cwg-stewardship/attachments/20150506/36816b5b/LettertoICGMay6-0001.pdf

[22] Which includes the unilateral assertion of its right to oversee the IANA function that the US government made back in 1998. For a complete account of the events, see http://www.amazon.com/Ruling-Root-Internet-Governance-Cyberspace/dp/0262632985

decision-making rights. So, in our view, the ICANN processes were not fully open. We associate with the criticism found at: http://forum.icann.org/lists/icg-forum/msg00011.html

While discussions in the RIRs were fully open, decisions regarding the addressing part of the proposal were made by a small team (CRISP) nominated by the RIRs. While CRISP did solicit inputs, in the end consensus was determined solely on the basis of the views of the CRISP team members. Again, in our view this was not a fully open process.

Further, the process has been unduly influenced by the US Congress.[23] Indeed, NTIA has recently indicated, in response to queries from the US Congress, that "maintaining security and stability" of the IANA function will likely require that ICANN and the IANA operator remain in the USA and be subject to US laws and US courts.[24]

CWG-Stewardship has publicly stated that its work was influenced by what it thought the US government wanted: "We believed that the IANA Stewardship Transition proposal would be more likely to be supported by the U.S. Government in a timely manner if jurisdiction was not changed at the outset."[25]

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[23] See for example https://www.congress.gov/bill/114th-congress/senate-resolution/71/text
http://judiciary.house.gov/index.cfm/2015/5/ip-subcommittee-to-hold-icann-oversight-hearing
http://judiciary.house.gov/index.cfm/2015/5/hearing-stakeholder-perspectives-icann
http://energycommerce.house.gov/hearing/stakeholder-perspectives-iana-transition
http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001939.html
http://fas.org/sgp/crs/misc/R44022.pdf
http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfJZ0aRwwmZN.pdf
http://mm.icann.org/pipermail/accountability-cross-community/2015-June/003695.html

[24] http://energycommerce.house.gov/hearing/internet-governance-progress-after-icann-53 During this hearing, the NTIA Administrator said that a condition for the transition would likely be that ICANN and IANA remain in the US, see the video stream at 45'57 and 46'50. See also the statement by Rep. Walden at 24'28.

[25] See http://mm.ianacg.org/pipermail/internal-cg_ianacg.org/2015-August/001334.html