COMMENTS ON THE IANA TRANSITION

We are lawyers from India working in the field of technology and Internet law. Please find below our response to the six questions put forth in the Call for Public Input.

1) Are these the correct principles to guide the process to develop a proposal to transition the stewardship of the IANA functions to the global multistakeholder community? If not, why not and what additional principles should be considered?

Although we affirm the principles identified in the Draft Proposal to guide the process to develop the NTIA Transition Proposal, we wish to propose some additional principles to guide the policy development process.

Please consider including the principle of “diversity” (which can be read as modifying both “global” and “inclusive”, which are currently listed in the Draft Proposal). This principle has two dimensions: it implies that the process to develop the NTIA Transition Proposal should both (i) include stakeholders from countries from around the world (i.e. be representative of all regions of the world), and (ii) include stakeholders from developing countries, and not be dominated by stakeholders from developed countries alone. Diversity should be reflected at two levels: first, the steering group itself should ideally be diverse in its composition (the Chairs of the ICANN Board and the GAC should ensure that both dimensions of diversity listed above are taken into consideration in selecting steering group members). And second, inputs should be solicited from stakeholders around the world keeping in mind both dimensions of diversity set out above.

Please also consider adding the principle of “timeliness”. This principle implies that the steering group will make all reasonable efforts to ensure that the final NTIA Transition Proposal is prepared and presented to the NTIA (subsequent to ICANN’s endorsement) in time to be implemented by September 2015 (i.e. in just 17 months’ time), which is when the ICANN-NTIA contract for the IANA functions will expire. We submit that the principle of “timeliness” will not, in any way, justify the making of any compromises, especially with respect to the inclusiveness of the process and its consensus-driven nature. It merely recognizes that the process must proceed with expediency (while retaining its full commitment to the principles expressed in this Draft Proposal), because a renewal of the ICANN-NTIA contract in September 2015 would further delay the transition of the NTIA’s stewardship function to a multistakeholder mechanism.

2) Are these the correct mechanisms to use in the process to develop a proposal to transition the stewardship of the IANA functions to the global multistakeholder community? If not, why not and what additional mechanisms should be considered?

We note that a key principle highlighted in the Draft Proposal is that the process shall be “consensus-based”. However, the actual consensus-based decision-making process should be clearly defined and incorporated as a mechanism. It is crucial for all stakeholders and the public to know how decisions will be taken while formulating the NTIA Transition Proposal. Will contributions be voted on by the steering group? And if so, will a simple majority suffice, or will unanimity/near-unanimity be required for a contribution to be incorporated into the NTIA Transition Proposal? In essence, it is clear that, as part of the policy development process, some contributions will be incorporated into the final NTIA Transition Proposal, and others will not. Our point is that the process by which these decisions are taken should be fair, transparent and
consistent.

Please also consider adding “outreach efforts” as a core mechanism. This would mean that proactive efforts should be made by the steering group to publicize the policy development process even beyond the ICANN community and the affected parties. It is important that the policy development process should (i) truly be “open to all”, including the general public, and (ii) be open to newcomers who have not previously participated in ICANN processes (such as the ATRT and AoC review processes).

3) Are there other factors ICANN as the convener of process should take into account relevant to principles and mechanisms to be used to develop a proposal to transition the stewardship of the IANA functions to the global multistakeholder community? If so, please describe

We note that the principles “inclusive”, “global” and “multistakeholder” are already included in this Draft Proposal, in addition to which we have suggested the incorporation of “diverse”. The cumulative effect of these principles should be that the policy development process respects the views of all stakeholders who submit contributions. This includes the general public, which is ultimately affected by the policies implemented by IANA and its overseeing body (whether the NTIA or its future replacement). We note that the steering group, as envisaged by this Draft Proposal, will comprise representatives of the SO/AC groups within ICANN and affected parties from the technical community. This composition creates a structural risk of bias (even if unintentional) towards submissions or proposals that come from the SO/AC groups and the technical community. Therefore, existing principles and mechanisms must ensure that the policy development process is sufficiently accommodating of contributions from the general public and any stakeholder from outside the SO/AC/affected party constituencies that are represented on the steering group.

4) Is this the creation of a steering group to steward the process to develop a proposal to transition the stewardship of the IANA functions to the global multistakeholder community the right approach? If not, why not and what other approach should be used in its place?

There is a necessity to create a co-ordination/steering group to steward the process to develop the NTIA Transition Proposal. The process of coordinating the different proposals and submissions in relation to the proposed transition could benefit from the creation of a centralized agency/group, which will be responsible for co-ordination and collation of the different and varied proposals. However, the process and the steps outlined to create the said steering group need greater clarity and discussion.

Will the primary role of the steering group, as this paper implies, be only to co-ordinate submissions from the wider community and organize them into a cohesive proposal? Or will the steering group take a more active role in formulating the NTIA Transition Proposal? A coordinating steering group is a good idea, but care must be taken to ensure that submissions are tabulated and implemented in a fair, transparent way. Active use of the mailing list (to update the community on the steps being taken by the steering group, for example by regularly sharing drafts of the proposal) would be a good way of ensuring this.

5) Are the steps outlined above to create and operate a steering group to steward the process to develop a proposal to transition the stewardship of the IANA functions to the
global multistakeholder community the right approach? If not, why not and what steps are missing?

The steps outlined in the Draft Proposal for the creation and operations of the steering group are unclear and require greater clarity before the steering group is finally created. The reasons for the same have been enumerated below:

- The steering group would comprise of members of 2 representatives from each of the SO/AC group within the ICANN community, and two representatives from each of the affected parties such as IETF, IAB and ISOC. The ICANN members will be selected by the Chair of the ICANN Board and the Chair of the GAC. The ICANN Board will also appoint one member as a liaison member to the steering group. As per the draft proposal, the role of the steering group is to co-ordinate the results and processes of undertaken by the affected parties so as to ensure compliance with the overall mechanism.

- The draft proposal does not mention or specify the process for approving the final proposal. One of the principles enumerated in the Draft Proposal is that the process would be "consensus-based" and therefore, by implication it may be assumed that the process for formulating the final submission to ICANN will be based on ‘consensus’. However, there is no clarity on what is meant by "consensus" – does it mean that there has to be an unanimous approval of all the members of the steering group, or does it imply that the majority of the members will have to approve the proposal? Further, even if the proposal is required to be based on a majority vote, does the majority vote have to be simple majority or a supermajority? Also, can the dissenting members record their dissent? In this regard, please also refer to our response to question 2.

- There is also a lack of clarity on the role of the member appointed by the ICANN Board (the “Board liaison”) to the steering group – will the ICANN Board member also have a vote? If yes, then the need for a further endorsement of the final NTIA Transition Proposal by ICANN is unclear.

- According to the Draft Proposal, the role of ICANN as a convener would be to ensure that (i) the NTIA Transition Proposal adheres to the principles outlined by the NTIA and (ii) that parameters of the scope document are upheld. However, the ICANN Board will not vote on the proposal. This again leads to the question of what are the powers available to ICANN have if it believes the process or principles are not being adhered to by the NTIA Transition Proposal? Can ICANN reject such a proposal and send it back to the steering group? Does the steering group have the right not to accept ICANN’s submission?

- As per the Draft Proposal, the steering group’s final proposal will be submitted to ICANN for its review and the affected parties in order for each party to provide their endorsement of the proposal. There will be no formal voting process. This again raises the question of the purpose of ICANN’s ”endorsement”? As there is no formal voting process, how are the affected parties required to communicate their agreement or dissatisfaction with the submission? Further, if ICANN or the affected parties do not agree with the submission, can they send it back to the steering group? Do they have the right to reject or modify the submission? Or are they compulsorily required to endorse the submission?

6) Are there are other factors ICANN as the convener of the process should take into account relevant to the creation of a steering group to steward the process to develop a proposal to transition the stewardship of the IANA functions to the global multistakeholder community? If so, please describe?

Please refer to the response to question 5 above.
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