



March 13, 2015

SPECIAL COMMUNICATION BY EMAIL

*The Honorable Senator John Thune
Chairman
US Senate Committee on Commerce, Science, and Transportation
United States Senate,
Washington DC, 20510*

*The Honorable Senator Bill Nelson
Ranking Member
US Senate Committee on Commerce, Science, and Transportation
United States Senate,
Washington DC, 20510*

Dear Honorable Senators,

Subject: Submission of Public Commentary: "No Legal Basis for IANA Transition" - A Post-Mortem Analysis of Senate Committee Hearing on 'Preserving the Stakeholder Model of Internet Governance'

*We hereby write to respectfully submit a copy of a recently published public commentary titled: ["No Legal Basis for IANA Transition": A Post-Mortem Analysis of Senate Committee Hearing](#) for your attention. This is regarding the recent US Senate Commerce, Science, and Transportation Committee full committee hearing on **"Preserving the Multi-stakeholder Model of Internet Governance"** which took place on Wednesday, February 25, 2015.*

*The article was published on CircleID on March 9, 2015 following the completion of the latest Committee Hearing. **The full text of the special public commentary is presented overleaf.***

We are also pleased to note the over-sighting activities that the US Congress has started concerning the 'IANA Transition' process that is being handled by the Internet Corporation for Assigned Names and Numbers (ICANN) under the supervision of the US National Technology & Information Administration (NTIA).

We commend your strong leadership of this and related matters of national public affairs and global import, and wish to thank you for your continued public service engagement and support.

Most respectfully yours,

Sbekele

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Executive Director, DotConnectAfrica Trust
Former Policy Advisor to ICANN gNSO

“No Legal Basis for IANA Transition”

A Post-Mortem Analysis of Senate Committee Hearing

“Only proper regulation by an independent agency with full Congressional mandate will ensure that a ‘FIFA-Mafia type’ organization of systematic corruption does not emerge. ICANN should not be trusted by Congress to regulate itself.”

Introduction – The cure is closer, and not arms-length, Internet supervision

The recent hearing conducted by the US Senate Committee on Commerce, Science & Transportation on ‘Preserving the Multi-stakeholder Model of Internet Governance’ which took place during the last week of February 2015, again showed that the Republican-controlled US Congress needs to act decisively to protect the status quo. The Senator Thune-led Committee convened the hearing on 25th February to look into the ‘IANA Transition’ and assess the level of preparedness of the non-governmental agencies that are handling the Internet Technical Management functions and assess threats regarding the possible take-over of Internet governance by foreign governments that might be antagonistic to US National Security, International Public Diplomacy and Internet Policy.

If the general fear supposes that if the US Government gives up control of some parts of the IANA functions would lead to a situation where some unfriendly foreign governments would now exercise control of critical Internet technical functions, then a correct medicine must be taken to cure a particular ailment that has been diagnosed. It is only closer, and not arms length, US government supervision that will control or mitigate any fears and anxieties of foreign take-over of the Internet. Therefore, Congress has to plug any existing legal loopholes, and tighten its administrative, technical, financial, public policy, and political oversight over the entire process no matter whose ox is gored.

The US Senate Committee heard from three (3) Panel witnesses, namely: the [Honorable Larry Strickling](#), Assistant Secretary of the National Technology & Information Administration (NTIA), an agency of the US Department of Commerce; [Ambassador David A. Gross](#), the former United States Coordinator for International Communications and Information Policy (2001 to 2009) within the US State Department, who presently leads the non-governmental Internet Governance Coalition (IGA); and [Mr. Fadi Chehadé](#), President & CEO of the Internet Corporation for Assigned Names and Numbers (ICANN).

Most of the witnesses made lengthy presentations that were, at times, heavy on historical content but which glossed over the purpose of the Senate Hearing. Only Ambassador Gross stressed that the IANA Transition Process should not to be rushed which was in line with the thinking of Senator John Thune; whilst the witnesses from the NTIA and ICANN are inclined to proceed full steam ahead, so as to submit a proposal and allow the ‘IANA Transition’ to occur at the expiration of the current IANA Contract by 30th September 2015.

ICANN Oversight to become a Mainstream Congressional Role

One important take-away for me from reading the Congressional documents, and watching a recorded video of the event is that regular oversight of the NTIA and ICANN will become a more mainstream activity for the pertinent US Congressional Committees that are keeping this matter within their purview. This is what I have always advocated (See for example, [Congress will Oversight ICANN - CircleID](#)).

The Senators have already sent an oversight letter to the NTIA to state their support for the present bottom-up multi-stakeholder process. Whilst voicing their concerns, the Senators also signaled the direction that they would like this to go: that is, any resulting proposal on the IANA Transition must not replace the NTIA's current role by a governmental or inter-governmental solution. Again, a similar condition is also stipulated in the NTIA's directive to the ICANN-led Multi-Stakeholder Group regarding any resultant proposal on the IANA Transition.

Therefore, even though the Senators might accept a process-led by a non-governmental Global Multi-stakeholder Group, tighter US government supervision would be required. Only the US Congress can provide this level of process oversight that would ensure that the 'Multi-Stakeholder Group' remains accountable to the global public interest that it is supposed to serve, and does not become a law unto itself.

A Legal Loophole that needs to be closed

“NTIA has fulfilled this temporary role not because of any statutory or legal responsibility, but as a temporary measure at the request of the President. Indeed, Congress never designated NTIA or any other specific agency responsibility for managing the Internet DNS. Thus, NTIA has no legal or statutory responsibility to manage the DNS.”

That a legal void currently exists was revealed by the above excerpt that I have been taken from Assistant Secretary Strickling's written presentation to the US Senate Committee hearing. It is obvious that the NTIA has so far acted out of political expediency to enable it play an important role; even though, within a nebulous legal framework. However, this must no longer be so, if the IANA Transition must take place.

As part of ensuring an enduring oversight mechanism, the Congress must now put a permanent legal structure in place to designate a specific agency for this role – with legal/statutory responsibility for managing (or regulating) the Internet DNS. **The NTIA believes that it did not have the legal responsibility to act, and that its role was temporary; so on what basis is the NTIA driving the current IANA Transition process without the requisite legal authority or Congressional mandate?**

I believe that the IANA Transition should be indefinitely postponed until such a time that a proper governing legal framework for it is established by the US Congress. Proper oversight has to be anchored on appropriate legal and statutory mechanisms that would guide the entire process. The

IANA Transition and resulting devolution to a Global Multi-stakeholder Group cannot be operated as long as this patent legal lacuna continues to exist. Congress must first of all be allowed to close any existing legal loopholes before those who are rushing the IANA Transition may be allowed to proceed.

Avoiding the ‘sorry Example’ of FIFA

Senator Thune in his opening statement was perspicacious enough to cite FIFA as the type of non-governmental example that must be avoided in the absence of proper US governmental control over the IANA Technical functions.

The International Federation of Football Associations (officially known as **‘Fédération Internationale de Football Association’** - ‘FIFA’) is the global body that governs the administration of ‘Soccer’ (which is the sport of Football outside the United States). The whole world is always busy enjoying the world’s ‘beautiful game’, without paying any attention to FIFA’s accountability or the transparency of FIFA’s actions and processes. In recent years, FIFA has been bedeviled by many controversies and unresolved scandals.

During the last few years, numerous allegations of administrative high-handedness, bribery, vote-rigging, vote-buying, corruption and graft relating to the award of World Cup hosting privileges, marketing rights and payments to FIFA Executive Committee members by special interest groups have been rife. Many of these accusations have been investigated by committees affiliated to FIFA but no one has ever been found culpable and properly punished, yet the allegations refuse to go away (See for example, [“Fifa ‘like mafia family’, says former FA boss Triesman”](#)). Many books have been written, and TV documentaries have been produced on this issue. If the oversight of FIFA had been within the purview of the US Congress, the organization would have been thoroughly investigated and ‘hammered’ like other sports governance associations in the United States, but since FIFA remains only accountable to itself and operating out of Zurich in Europe, the world soccer governing body has continued with ‘business as usual’.

It is therefore the responsibility of Congress to ensure that the IANA Technical functions are not transitioned to a Global Multi-Stakeholder Community that will become like FIFA. FIFA has refused to demonstrate any accountability to the global public interest that it serves or to the international coalition of quasi-nongovernmental organizations (**‘quangos’** - Country Football Federations and Associations) that comprise its membership.

It is often mentioned that **‘the love of money is the root of all evil’**, and a global body suffused with cash but not accountable to anybody, will fall into many evils of corruption. ICANN’s coffers are beginning to bulge with cash that it has no idea how to spend: monies that it has garnered from new gTLD application fees, and auctioning of some new gTLD names plus cash generated from regular industry-sponsors of its events. ICANN has so far not shown how it intends to spend these enormous surpluses for the global public interest. Rather, it regularly pays millions of dollars in per diems and hefty allowances to Board members and those within the ICANN Community that it sponsors to its

events. **Those who continue to benefit from these sinecures have no interest in fiscal accountability and would not welcome any oversight from any external body.**

Again, the US Congress must be steadfast in ensuring that ICANN or anybody that takes eventual responsibility of the Internet DNS functions does not become like FIFA but must remain fiscally responsible and accountable to a regulatory structure that will be set-up by Congress. Accumulated surpluses in billions of United States Dollars that are held by organizations like FIFA and ICANN should be properly escrowed with an International Financial Pool or given to global charities such as UNICEF (the United Nations Children's Emergency Fund) and the International Federation of the Red Cross and Red Crescent societies so that excess funds in the hands of unaccountable officials does not engender a culture of unbridled financial recklessness and runaway international corruption.

ICANN Remains Unaccountable

The issue of ICANN's accountability remains unresolved. All those who are involved in the ICANN Global Community have continued to complain about ICANN's accountability or lack thereof. The existing ICANN accountability mechanisms remain at best unsatisfactory.

Senator Thune has made it clear that reforming ICANN's accountability processes must precede any IANA Transition deal. It would be foolhardy to completely devolve the Internet Technical Management functions to a Global Multi-Stakeholder Community that pivotally rests on an ICANN that is widely perceived as largely unaccountable. As a matter of fact, without the required accountability process improvements, it would not be long before ICANN becomes just like FIFA. This must be prevented at all cost.

ICANN's respect within the community that it represents continues to decline at a rapid pace. The administration of the ICANN new gTLD program led to the institution of eleven (11) Independent Review Panel (IRP) legal proceedings that have been lodged against ICANN by different bodies that have disagreed with ICANN decisions. These IRPs are usually invoked after internal mechanisms such as 'Requests for Reconsiderations' and 'Cooperative Engagement Processes' (CEPs) have been completely exhausted. Everyone knows that the ICANN Board Governance Committee (BGC) regularly refuses any submitted re-consideration requests. The organization would rather go to an expensive legal proceeding instead of re-considering its internal decisions. This demonstrates that there is urgent need to re-evaluate ICANN's decision-making if those within the community continue to question ICANN's decisions which are already seen as not unimpeachable.

Again, it needs not be over-emphasized that an unaccountable ICANN cannot take responsibility for a completely devolved IANA Technical function. Therefore, it must be re-emphasized once again, that the IANA Transition should not be rushed, and should be indefinitely delayed by the US Congress until ICANN's accountability mechanisms have been fully reformed to make those processes more reliable and trustworthy.

The Need to Continue Defunding the IANA Transition

The US\$1.1 trillion Omnibus Spending bill expressly defunds the IANA Transition until September 30, 2015. The current term of the IANA contract implementation that is presently in force between the NTIA and ICANN runs until 30th September 2015. Thus, as I have previously reported, the IANA Transition cannot take place in violation of US Federal Law that has defunded it within a stipulated time-window; neither would the IANA Transition happen without the express approval of the proposal by Congress. This peculiar proviso in the Omnibus spending bill actually implies that Congress believes that the IANA Transition should be delayed with proper deliberation, and not be rushed as ICANN and NTIA are inclined to.

Therefore until certain things happen, it would be prudent for the US Congress to continue defunding the IANA Transition process beyond September 30, 2015. As already mentioned, any existing legal loopholes have to be closed, first of all to ensure that a proper legal regulatory framework is put in place to govern the IANA Transition. This is an important duty for Congress to perform – that is, its primary law-making role in addition to executive oversight that happens after the fact. Second, ICANN’s accountability processes must be completely reformed and improved upon. Third, any complete proposals on the IANA Transition that are developed and submitted by the ICANN-led Global Multi-stakeholder Community (working as the ‘IANA Stewardship Transition Coordination Group’) must be thoroughly evaluated and scrutinized by the US Congress to ensure that it satisfies the most rigorous standards of probity and policy expectations regarding an accountable governance structure; and enduring US Government oversight of a non-governmental body that might be saddled with an important global responsibility. At the same time, those that are preparing and submitting the IANA Transition proposals under the aegis of ICANN should also not be evaluating the proposals that they have developed, and further ‘awarding’ the devolution process to themselves – as ICANN that always draws expertise from the same small gathering field of people that it feels comfortable to work with. **Only the US Congress can ensure that there are proper ‘checks and balances’.**

Working Methods from Contemporary US Public Experience

Contemporary US public policy and administration experience suggests that a trusted method that works is the devolution of functions to a quasi- public-private model that is properly over-sighted by the US government and regulated by a body that is fully empowered by law. One only needs to look at the current US Federal Environmental Management and Protection Regime to see how this sector is managed and regulated; and also the US Banking, Financial, and Securities sector to see how these important economic pedestals are governed. The environmental and natural resources policy sectors have been protected because of robust legal provisions and oversight by the US Congress and close governmental regulation by the US Federal Environmental Protection Agency (EPA). Similarly, those who violate US Financial and Securities laws and policies have been made to face huge financial penalties and other legal risks. It is only close government supervision that protects the public from institutions that may become neglectful of their responsibilities or who chose to remain unaccountable. Multi-stakeholder Internet Governance should be similarly handled based on normative governmental regulation and oversight.

I believe that such proven methods from contemporary US Public Policy experience must be applied in administrating any Internet Governance structure that would result from the IANA Transition proposals. This further underscores the need for Congress to establish a US Internet Regulatory Authority (USIRA) which I had called for in my December 2014 article (See [Congress will Oversight ICANN -CircleID](#)). The proposed USIRA should be set-up by Congress to exercise direct supervisory responsibilities over the working relationship between the NTIA and ICANN; and the governance of any regime that results from the IANA Transition process. Such a body will also take responsibility for Internet policy-setting and governance, whilst the NTIA and the ICANN-led Global Multi-stakeholder Community take responsibility for technical program implementation. The present situation where the same body sets policy and also implements is highly flawed in terms of its conceptual design.

Dissimulation: NetMundial and the Dissatisfaction of Brazil, ICANN GAC and Other Issues

NMI: It is often argued by those who have been strenuously pushing for the IANA Transition that the NetMundial Initiative (NMI) (“Global Multi-Stakeholder Meeting on the Future of Internet Governance”) was devised to address the evident dissatisfaction of countries like Brazil with the current Global Internet Governance structure. Nothing could be further from the truth. With respect to Internet Governance, the BRICs (Brazil, Russia, India and China plus South Africa) have, in recent years, pushed for a UN/ITU-led model of Global Internet Governance and not the present ‘US-centric’ ICANN-led Multi-Stakeholder Model. The main reason for Brazil’s ‘apparent dissatisfaction’ is due to the Snowden revelations of NSA’s surveillance activities on foreign government leaders and not because of the structure of Global Internet Governance. Any claims to the contrary are meant to dissimulate and mislead.

The same way that Brazil has been won over to the ‘Multi-Stakeholder Camp’ through involvement, consultations, reassurance and cooperative outreach is the same way that other countries (that is, those who are not opposing just on account of perceived US-Internet hegemony) may also be won over; but not because the NTIA has agreed to an ‘IANA Transition’ to a Global Multi-Stakeholder Community. One argument that is now being presented by ICANN to accelerate the IANA Transition process is that devolution of the IANA technical functions will curb the agitation by certain countries to push for the UN/ ITU-led model of Global Internet Governance. My view is that those countries that oppose ‘US-centricity’ will always favour a UN/ITU-led model irrespective of whether an IANA Transition occurs or not.

ICANN GAC: Before concluding, it is important to also comment on the issue of ICANN Governmental Advisory Committee (GAC). It is a well-known fact that ICANN decision making is often ‘grid-locked’ on account of GAC Policy Advice. This has often given the ICANN GAC body an extraordinary amount of influence within ICANN which typically undermined the ‘Multi-Stakeholder’ principle as governments at ICANN inadvertently assumed an exaggerated role.

It was ICANN’s intention to give more power to governments and inter-governmental organizations represented on the ICANN GAC body, by setting a voting threshold of 2/3rd of ICANN Board Members that can overturn a GAC Advice/Decision. During the recent Senate Committee Hearing, the ICANN CEO

has signaled that the ICANN Board will not accept decisions from the GAC, presumably to bring ICANN Board thinking to be more in line with the IANA Transition expediency (benchmark) of ensuring that any final Transition Proposal does not replace the NTIA's current role with a government-led or inter-governmental organization. It seems that this admission was actually forced from Mr. Fadi Chehade because of a probing question from Senator Debra Fischer (Republican-Nebraska), member of the Senate Commerce, Science and Transportation Committee, who pointed out the inconsistency of the 2/3rd threshold of rejecting GAC Advice with limiting governmental influence in a Post-IANA Transition regime. This reversal of intention remains to be seen in practice, since there could be an ICANN Board-ICANN GAC confrontation.

Conclusion

I believe that the argument made that the US Congress can, and would oversight ICANN is already won. I think that I have also won the argument that Congress will be deliberative, and aware of its arduous responsibilities regarding Internet Governance; remain focused and due-process oriented, and not allow itself to be steamrolled by both the NTIA and ICANN regarding the IANA Transition.

The case for 'Transition' has NOT been properly made, since nobody has said that "Global Internet Governance is broken and now needs to be fixed". ICANN accountability and transparency process improvements should be more of priority concern instead of exerting inordinate and very ambitious efforts to 'fast-track' the IANA Transition.

Recommendations:

- 1) Congressional oversight of the 'IANA Transition' should be deepened to ensure that any proposals developed and submitted by the ICANN-led Global Multi-Stakeholder Community are independently evaluated, but not by the same group of people that prepared the proposal in the first place.
- 2) The legal loopholes that have been identified need to be properly closed by the US Congress.
- 3) It must be reinforced that the duties of Internet Policy-Setting should be separated from Internet Technical Program Management, so that the same organization does not handle policy governance and technical implementation like ICANN is currently doing, i.e. there should be a formal separation of duties.
- 4) An Internet Regulatory Agency that reports directly to Congress is now required more than ever to help shepherd this complex process. Only proper regulation by an independent agency with full Congressional mandate will ensure that a 'FIFA-Mafia type' organization of systematic corruption does not emerge. ICANN should not be trusted by Congress to regulate itself.
- 5) And finally, Congress must act as soon as possible to ensure that there are no process irregularities, so as to help mitigate identified risks.

The process should be driven by critical-thinking and considered consultations with Congressional leaders and not based on scare-mongering and other tactics of dissimulation.

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