Roadmap for the Further Evolution of the Internet Governance Ecosystem ? ICANN

- Area: ROADMAP FOR THE FURTHER EVOLUTION OF THE INTERNET GOVERNANCE ECOSYSTEM
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Abstract

This is a joint submission principally authored by ARTICLE 19 in consultation with other stakeholders and published through the platform of the Best Bits civil society network, where it has been endorsed by the organisations and individuals listed at http://bestbits.net/netmundial-icann/. It is the third of three such joint submissions, the others being on Internet governance principles (at http://bestbits.net/netmundial-principles/) and on other institutional mechanisms in the further evolution of the Internet governance ecosystem (at http://bestbits.net/netmundial-roadmap/).

Document

Introduction

On 23-24 April 2014, the Global Multistakeholder Meeting on the Future of Internet Governance (NETmundial 2014) will meet in Brazil to discuss a roadmap for the further evolution of the governance ecosystem. This submission deals with the place of the Internet Corporation for Assigned Names and Numbers (ICANN) in this ecosystem.

Whilst ICANN has indicated on several occasions that it solely focuses on the technical administration of the Domain Name System (DNS) and the coordination of the IP address space, it is simply impossible to ignore the broader public policy dimensions of its work. This includes, among other things, intellectual property, competition and taxation policy. In particular, ICANN defines and enforces intellectual property rules regarding rights in domain names, which inevitably has a highly significant impact on the ability of internet users to access information and therefore, the meaningful exercise of the right to freedom of expression.

Over the years, however, several concerns have been raised about ICANN's legitimacy in taking policy decisions in certain areas due to its corporate governance arrangements, in particular:

- The lack of independence from the US government as regards the IANA function;
- The lack of representation of developing countries within ICANN;
- The disproportionate influence of the Government Advisory Committee (GAC);
- The lack of accountability of the Board.

In this submission, ARTICLE 19 and the undersigned organisations offer some recommendations with a view to improving ICANN's current governance structure and accountability, as well strengthening the protection of human rights within ICANN. We believe that reform of ICANN is inevitable if it is to fulfil its promise as a truly global multistakeholder organisation. In order to succeed, we believe that any reform of ICANN should be guided by the following principles:

- Multistakeholder, not multilateral
- Human Rights, in particular the rights to free expression, privacy and due process.
- Transparency & Accountability
- Inclusiveness & Diversity

We elaborate on what this means in practice further below. It is hoped that our submission will prove valuable for the safeguard of the multistakeholder model of Internet Governance.

A. ICANN's legal status

We believe that, in order to both ensure ICANN's independence and protect it from the disproportionate influence of governments, ICANN's nongovernmental status should be affirmed and formalised. By the same token, it would allow for ICANN's nature as a multistakeholder organisation to be both maintained and strengthened.

For the same reason, we would oppose turning ICANN into an international inter-governmental organisation, which would make the organisation subordinate to the interests of Member States.

B. Mandate

Although ICANN's foray in content regulation has been very limited so far (see, for instance .xxx controversy), we are concerned that its policy-making powers could in principle allow it to engage in these kinds of activities to a greater degree. We therefore recommend that ICANN's mandate should be clarified and narrowed, for example by:

- Introducing a provision in ICANN's bylaws prohibiting the organisations from engaging in content regulation or conduct that would violate the rights to freedom of expression or privacy.

- Introducing in ICANN's bylaws a right of private parties to initiate legal challenges to ICANN actions on these grounds, which could be taken before the local courts or, in exceptional circumstances before an arbitration tribunal.

- The resolution of trademark and other Intellectual Property disputes should duly take into account the right to freedom of expression and the right to culture as laid down in international instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

C. Location / Applicable law

To the extent that ICANN should remain a non-profit public benefit corporate organisation, Californian law would appear suitable.

However, in line with the President's Strategy Committee (PSC)'s 2009 report, it may be desirable for ICANN to delegate some of its functions to subsidiaries that would be located elsewhere.

There are a number of advantages to ICANN not moving its headquarters outside the US:

- it would ensure the stability of current contractual arrangements with registries, registrars etc.;
- there would be no need to negotiate with the USG;
- it would not prevent ICANN from expanding its reach beyond the US. To a certain extent, that has already taken place through the creation of various hub and engagement offices around the world.

Ultimately, the question whether ICANN should create subsidiaries outside the US is very much an operational decision, involving numerous parameters, that is beyond the scope of the present document.

Finally, it is worth noting that the PSC 2009 report suggested that Switzerland and Belgium might offer suitable solutions for ICANN to pursue its objective of international expansion. If, for example, ICANN were to decide to open a subsidiary in Switzerland, an interesting question might be whether the IANA function or one aspect of it could be delegated to that entity.

D. Denationalise the IANA contract

Acceptable solutions for assignment of the IANA root zone function should meet several criteria: (1) protection of the root zone from political or other improper interference; (2) integrity, stability, continuity, security and robustness of the administration of the root zone; (3) widespread trust by Internet users in the administration of this function; (4) support of a single unified root zone; and (5) agreement regarding an accountability mechanism for this function that is broadly accepted as being in the global public interest.

In order to protect the rootzone from political interference, we believe that multi-

lateralisation of the IANA contract should be avoided. Rather, to the extent that it is functionally feasible, we believe that the IANA function should be delegated to different private entities along the lines suggested by the IGP. For instance, there is no reason in principle why the IANA functions should be concentrated in ICANN, which already performs a wide range of functions. Greater effectiveness and accountability are more likely to be achieved through a distributed model of governance here.

E. Improved representation and participation of developing countries

- This should take place both within ICANN generally and the GAC specifically.

- Sufficient fund should be allocated to this end, for instance by redirecting some of the revenues from gTLD domain name registrations to developing countries.

- In line with the Accountability and Transparency Review Team 2 (ATRT2) recommendations, ICANN should translate all its working documents, policy, minutes of meetings in the UN official languages.

F. Making the GAC more inclusive, transparent and accountable

- Following the recommendations of the ATRT 1 and 2, GAC's proceedings should be made open to other stakeholders to observe and participate, as appropriate. This could possibly be accomplished through the participation of liaisons from other Advisory Committees and Supporting Organisations to the GAC, once that mechanism has been agreed upon and implemented;

- The GAC's working methods should be made more transparent along the lines recommended by the ATRT 1 and 2;

- There is no reason in principle why GAC's advice should be given more weight than that of other advisory committees. The same privilege should be extended to the other advisory groups, e.g ALAC and SSAC, by amending ICANN's bylaws accordingly. More generally, the GAC should be on a equal footing with the other advisory committees;

- Granting any additional powers to the GAC should be firmly resisted, including the delegation of ccTLDs to governments. Whilst this may seem as naturally falling within states' jurisdictions, it carries with it high risks for

the right to freedom of expression if used as a means to control content;

- Consideration should be given to mainstreaming government representatives participation within supporting organisations, in particular the Generic Name Supporting Organisation. A working group could be put in place to that effect.

G. Accountability of the Board

- The decision-making process of the Board should be made more transparent in line with ATRT2 recommendations, including the giving of reasons for its decisions;

- The Independent Review of Board Actions should be strengthened. At a minimum, the Independent Review Process Panel's decisions should be both binding and contain reasons, which should be made public as a matter of principle;

- There should be a possibility to call for dissolution of the Board in exceptional circumstances;

- If ICANN's status as a private organisation is to be retained, consideration should be given to broadening the scope of the issues that can be taken up before the local courts, in particular issues relating to the right to freedom of expression. Another possibility would be to include a unilateral option clause that would enable a choice between the local courts or arbitration proceedings.

Conclusion

For ICANN's reform to be successful, it is vital for the private sector, civil society, governments and users to be engaged in conversations about Internet Governance because of their inherent value for innovation, protection of rights, stability and security. We hope that the above proposal will help stimulate discussion about reform of ICANN.