Internet Governance, Multi-stakeholder models, and the IANA Transition:

Shining Example or Dark Side?

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Multi-stakeholder models refer to decision-making processes that involve wide consultation of all interested parties. It has been stated that one particular version of such models is widely used in Internet governance and has been very successful in achieving desirable outcomes. This paper shows that in fact no single multi-stakeholder model is used for Internet governance. It then examines the IANA function, which is governed by a particular version of the multi-stakeholder model, and the current discussions regarding the reduction of the role of the US government in that governance (the so-called "IANA transition"). The paper argues that the IANA transition is not a good example of best practices for multi-stakeholder models in Internet governance.

Internet governance, IANA transition, multi-stakeholder models, democracy

1. Introduction

The purpose of this paper is to analyze critically one particular multi-stakeholder process, the IANA transition, and to show that it should not be used as a model for other aspects of Internet governance. That is, we attempt to address a question posed by De Nardis and Raymond (2013): "whether there is a need for more multistakeholderism in

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particular functional areas of Internet governance, or whether there are more effective and more appropriate means of instantiating democratic values in areas of policy likely to engage important public values and interests."

We start by providing background information on multi-stakeholder processes, Internet governance, and differing views of the role of governments in Internet governance in general, and in the Internet Corporation for Assigned Names and Numbers (ICANN) in particular. We then describe the Internet Assigned Names Autority (IANA) function and the recent decision by the US government to end its oversight of that function. We describe the process used to end US government oversight and the results of that process, concluding that, while it is an important process, it should not be held out as a model for multi-stakeholder governance.

We do not argue that the processes and practices characterising the IANA transition or ICANN are typical of the weaknesses or limits of multi-stakeholder processes in general. Nor do we offer a detailed proposal for a different institutional setting that could have avoided what we consider to be weaknesses of the IANA transition – our purpose is to provide elements and pointers that will assist other authors to explore the possibilities of other institutional settings.

2. A brief introduction to multi-stakeholder processes

Multi-stakeholder processes have been utilized throughout history as a means of coordinating management over shared space and/or resources. Fundamentally, such processes are an exercise in collaboration, which occurs when "a group of autonomous stakeholders of a problem domain engage in an interactive process, using shared rules, norms and structures, to act or decide on issues related to that domain" (Wood and Gray 1991, p. 146).

Recent interest in multi-stakeholder processes stems from a number of factors, but most apparent is that the current system of international governance is messy and ill equipped to address the growing number of transnational challenges facing the world. Developments such as the growth in global telecommunications networks and the general opening of countries to trade and travel have created opportunities for the creation of new and powerful multi-stakeholder groups, though, these coalitions have typically been dominated by the US and its allies (Mattelart 2003). This era is sometimes referred to in international relations as the emergence of "international regimes" (Ruggie 1975; Young 1999), governance without government (Rosenau and Czempiel 1992), or, more recently, "government as networks" (Goldsmith and Eggers 2004). Reinicke (1999-2000) refers to this phenomenon as the emergence of global public policy networks. Focusing on how these networks have the capacity to produce positive change, transcending traditional geopolitical considerations, Waddell (2003) describes them as "global action networks" (GANs).

Recent interest in multi-stakeholder decision making processes can also be traced back to Klaus Schwab and the rise of the World Economic Forum (WEF). In the 1960s, Schwab campaigned to adopt a "stakeholder" approach to firm management, organizing three meetings in Davos, Switzerland, and encouraging European firms to adopt this new style of "American" corporate leadership. Schwab argued that, in order to be effective in maximizing a firm's potential, and competing in an increasingly global marketplace, managers need to take account of the interests of all the stakeholders in the firm (Schwab 1971).

Further, Schwab (2008) reflected, "companies not only must be engaged with their shareholders but are themselves stakeholders alongside government and civil society." To this end, WEF spearheaded the Global Redesign Initiative, which aimed at

a major re-thinking of global governance to "promote integrated thinking and develop proposals to improve structures of international cooperation in a wide range of areas" (WEF 2010) by redefining "the international system as constituting a wider, multifaceted system of global cooperation in which intergovernmental legal frameworks and institutions are embedded as a core, but not the sole and sometimes not the most crucial, component" (WEF 2010, p. 24).

Buxton (2016) states that WEF "effectively proposes a transition away from intergovernmental decision-making towards a system of multi-stakeholder governance." Gleckman (2012) provides a comprehensive analysis of the WEF proposal. However, critics state the WEF model is not compatible with the fundamental principles of democracy, accountability and the rule of law. For example, Gleckman (2016, p. 95) notes: "there are simply no clear rules for MSGs [multi-stakeholder governance processes] on accountability, responsibility, dispute settlement, and representation – key elements that are otherwise accepted as core principles for a legitimate global governance process."

2.1 Multi Stakeholder Processes in Action

Moving beyond the WEF, there are other examples of multi-stakeholder processes emerging outside of the formal structures of international governance, whereby coalitions of the willing come together to tackle shared problems. Four major examples include: the International Organization for Standardization (ISO), the Consultative Group on International Agricultural Research (CGIAR), the International Union for the Conservation of Nature (IUCN), and the International Corporation for Assigned Names and Numbers (ICANN),.

The ISO was established in 1947 and quickly became the world's largest developer of voluntary international standards. By 2016, it published more than 21,000

international standards, covering every industry, from technology, to food safety, to agriculture and healthcare (ISO 2016).

Technically a non-government organization, at ISO's core are the national standards bodies of its 166 member countries, as well as 3,368 technical bodies overseeing standards development at the national level. While membership is country-based, drawn from national standards setting bodies, these individuals represent a mixture of vendors, manufacturers, governments, consumers, professional bodies and academia.

CGIAR, founded by the Ford Foundation in 1971, is "a global partnership that unites organizations engaged in research for a food secure future" (CGIAR 2015). Today, the organization has sixty-four public and private institutional members working on agricultural research, thirteen international organizational members including the World Bank and four private foundations.

Founded in 1948, The IUCN "helps the world find pragmatic solutions to our most pressing environment and development challenges" by working towards the "equitable governance of [nature], and deploying nature-based solutions to global challenges in climate, food and development" (IUCN 2015). It is the world's oldest and largest environmental organization, boasting 1,200 governmental and NGO members and nearly 11,000 volunteer civil society experts representing 160 countries.

ICANN is discussed in section 4 below.

2.2 Conclusion

To conclude this section, we note that our historical analysis confirms the findings of other authors (De Nardis and Raymond 2013; Hoffman 2016): multi-stakeholder governance can take different forms, and there is no single model or set of best practices adopted across sectors. Yet, as varied, and overlapping multi-stakeholder arrangements

emerge in response to major public policy challenges requiring a coordinated, transnational response, it remains unclear how these arrangements will support or undercut existing governance structures and regimes. The current arrangement for global governance is arguably similar to that of feudal Europe, whereby multiple arrangements of decision-making, including the Church, cities ruled by merchant-citizens, kingdoms, empires and guilds co-existed with little agreement as to which actor was actually in charge over a given territory or subject matter. It was in this tangled system that the nation-state system gained legitimacy precisely because it offered a clear hierarchy of authority for addressing issues of the commons and provision of public goods (Waddell and Khargram 2007). This historical reference may be relevant when considering the future of global governance: systems of overlapping and ambiguous authority may be unsustainable in the long-term. Without a clear, shared sense of who is ultimately responsible, chaos may ensue. Pressing public policy issues require clear lines of authority, and responsibility, in order for publics to hold political actors accountable for addressing challenges to the best of their capacity. Which is not to say that governance should not be multi-stakeholder. On the contrary, complex issues can only be addressed satisfactorily by consulting all interested parties.

We now turn to Internet governance, and we explore whether it provides a model for the multi-stakeholder processes that will be needed in the future.

3. Internet governance

The most widely used definition of Internet governance is: "the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet" (WGIG 2005).

The respective roles of governments, the private sector and civil society were outlined in the Tunis Agenda (WSIS 2005) and reaffirmed in a UN resolution (UN 2015). While those statements were agreed by states (with some input from non-state actors and criticism from both state and non-state actors), the concept of respective roles was endorsed also in recent consultation processes that were fully open to non-state actors and whose final outcomes were agreed by all participants (but not necessarily by all "stakeholders", since those processes were informal and thus did not ensure representativity) (Netmundial 2014; WSIS+10 2014). In essence, states are responsible for international Internet-related public policy issues[2], while the private sector is responsible for the technical and economic development of the Internet. Civil society has an important role to play and intergovernmental organizations have a facilitating role in the coordination of Internet-related public policy issues. International organizations have an important an important role in the development of technical standards and relevant policies.

The respective roles must not be understood as hard and fast rules, but rather as a guide to what types of decision-making procedures are best suited to certain types of issues (e.g. technical issues are best handled by the private sector). And in fact no single model is used for the wide range of activities that comprise Internet governance (De Nardis and Raymond 2013).

Yet as Hoffman (2016) points out, the so-called multi-stakeholder model has become somewhat of an idealistic narrative for Internet governance, despite not having

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[2] A recent resolution goes so far as to state: "We recognize the leading role for Governments in cybersecurity matters relating to national security." (UN 2015, paragraph 50).

fully achieved stated goals. Hoffman goes on to point out that there is a problem when: "critical reflection [on multi-stakeholder processes] no longer takes place, or is only tolerated at the fringes, and when fictions become static and begin resembling a religion. In this spirit, a measured 'desecration' of the multi-stakeholder approach in Internet governance which could facilitate a debate about achievements, failures and its reasons would be a positive effect."

As already mentioned, the purpose of this paper is provide just such a critical reflection.

3.1 The so-called "equal footing" multi-stakeholder approach.

Regarding Internet governance, there have been references to a multi-stakeholder approach in which decisions are made by consensus of all of the stakeholders. That is, all stakeholders have "equal footing" and there are no particular roles or responsibilities. While this is not the official view of any government, it has been put forward by a high-level US official, in the context of the Internet Corporation for Assigned Names and Numbers (ICANN) as follows: "This multistakeholder approach to Internet governance – in which technical experts, civil society, private industry, and governments make policy decisions on a consensus basis – is the best mechanism for maintaining an open, resilient, and secure Internet" (Strickling 2015). A similar statement is: "It is important that stakeholders come together on an equal footing. The best way to ensure that all parties are treated equally is to make decisions on a consensus basis. Final decisions need to reflect the views of all stakeholders as opposed to just the views of only one of the stakeholder communities involved" (Strickling 2015a).

Such statements have been challenged (Gurstein 2014; Hill 2014) on the grounds that such an approach is not democratic, that it is biased in favor of industry and that, to the extent that it has actually been used in practice, it has not achieved the

desired outcomes. That is, such an approach would be the epitome of what De Nardis and Raymond (2013) describe: "Across a number of crucial governance functions, the reality [of multi-stakeholder Internet governance] is perhaps closer to industry self-regulation than to genuine multistakeholderism." Powers and Jablonsky (2015) argue that the approach has been used to further the economic and geopolitical goals of the United States of America. Such an approach has also been criticized in the context of health care, on the grounds that it fails to recognize the fundamentally different nature and roles of private companies versus other non-state actors (Saez, 2016).

3.2 Best practices for multi-stakeholder models in Internet governance

Given the importance accorded to multi-stakeholder models in Internet governance both by those involved in the day-to-day operation of the Internet, and in government declarations, it is understandable that there are initiatives to define the best practices that should prevail in Internet governance.

A Best Practice Forum (BPF) of the Internet Governance Forum (IGF) has produced a compilation of best practices for multi-stakeholder processes in the context of Internet governance. According to that document (IGFBPF 2015), "a key factor in facilitating productive outcomes through multistakeholder mechanisms is the presence of trust among stakeholders" and "transparency and accountability were two critically important components of building trust". An open question is "whether multistakeholder mechanisms can operate with an authority of their own without the ultimate backing of a government or an intergovernmental agreement". Furthermore, inclusiveness is not sufficient at present.

Malcolm (2015) provides more specific criteria that a body should follow in order to ensure meaningful stakeholder inclusion in global Internet governance processes:

- The body should have access to the perspectives of all those with significant interests in a policy problem or its possible solutions.

- There must be mechanisms to balance the power of stakeholders to facilitate them reaching a consensus on policies that are in the public interest.

- Mechanisms of accountability must exist between the body and its stakeholders to demonstrate the legitimacy of their authority and participation respectively.

- For each stage involved in governance, the body should either be directly empowered to execute it, or linked to external institutions that have the authority to do so, as appropriate.

Belli (2015) takes a critical stance with regard to the sole reliance on the multiplicity of stakeholders rather than focusing on the heterogeneity of stakeholders' interests. As he puts the matter: "stakeholder participation should be seen as a way of supplementing and enhancing democratic processes rather than substituting them." Participation by a predefined group of stakeholders may not be sufficient to ensure that all interests are represented, and this in particular because participation in multi-stakeholder processes is typically voluntary, in contrast to formal representative systems where individuals are elected to represent constituencies. Further, participation in multi-stakeholder processes is typically time-consuming, so many participants are funded by commercial interests.

Belli concludes that participatory democracy and representative democracy are complementary: representation and direct participation (e.g. through consultations) must be combined "in order to guarantee the full enjoyment of the individuals' fundamental right 'to take part in the conduct of public affairs, directly or through freely chosen representatives.' (ICCPR, art 25.a)" (The citation is to the International Covenant on Civil and Political Rights.)

The same points have been made by Bollow and Hill (2014, 2015): multi-stakeholder consultations must be transparent, open, and inclusive, allowing all interested parties to participate on an equal footing. But decisions involving public policy matters must be made by democratic bodies that ensure the representation of all concerned citizens. That is, multi-stakeholder processes must be embedded in, and complement rather than replace, traditional democratic governance processes.

3.3 Internet Governance and democracy

Multi-stakeholder processes for Internet governance have been embedded in national democratic governance processes, see section 4 below.

But it is not obvious how to embed multi-stakeholder processes into democratic governance at the international level, for a number of reasons. First, the members of intergovernmental agencies are states, and non-state actors cannot participate fully in all discussions, even if there has been progress recently in permitting more participation of non-state actors. Second, states are not necessarily willing to allow one of their non-state actors to contradict their own positions during international discussions: this is understandable to the extent that the state's position is supposed to reflect the interests of all the citizens of the state, so the state is not keen to have it said that that is not the case. Also, it is not clear how to resolve tensions between non-state actors (whether private companies or non-governmental organizations) and government agencies. Third, participation in international discussions typically involves significant travel and knowledge of at least one of the six official UN languages, but in practice a good knowledge of English is required. Fourth, and perhaps most importantly, intergovernmental agencies are comprised of the executive branches of governments, there is no international equivalent of a national parliament, and (apart from some

exceptions) there is no binding international court system. Thus the separation of powers that is fundamental to democracy does not exist at the international level.

In addition, it must be noted that not all states are democratic, so decisions taken by a gathering of states do not necessarily reflect the will of the citizens of those states. Multi-stakeholder processes are based on the presumption that all parties are committed to democratic processes and outcomes, so what happens when non-democratic governments intervene in such processes?

It is worth noting that some of the fervent proponents of the multi-stakeholder approach for Internet governance don't actually apply the approach for all issues. For example, the US prefers to discuss intellectual property issues in traditional intergovernmental organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), or in secretive multilateral discussions such as the Trans-Pacific Partnership (TPP) or the Trans-Atlantic Trade and Investment Partnership (TTIP) (see Chien and Palfrey [2016] for a discussion of the secretiveness of the TPP and TIPP negotiations and its negative effects).

Thus there are considerable differences, in practice, regarding the role of governments with respect to the international aspects of Internet governance, depending on the issues to be discussed.

4. The Role of Governments

Traditional democratic governance processes are, at the national level, implemented by national governments. But there is a long line of people who take the view that the Internet should not be subject to ordinary laws, see for example Reidenberg (2005, pp. 1953-1954). But that line of thinking (which Reidenberg refers to as "separatists") is a minority line, see for example Brownsword (2012), Reed (2012), and the statement that "the same rights that people have offline must also be protected online" which appears

in several UN Resolutions (for example UN [2015, paragraph 43]). Outside of a small circle of enthusiasts, there is today general agreement that offline laws apply equally online and that states will be involved in Internet governance. A good analysis of why this is the case is given in Malcomson (2016 pp. 127-137 and 190): in essence, national security and economic policy concerns will lead states to become involved in Internet matters.

Thus governments have an important role to play with respect to at least certain Internet governance matters: they must enforce existing laws, adapt them in light of the evolution of technology, and perhaps write new laws to cover issues that arise because of technological evolution.

An excellent example of the third situation is provided by network neutrality: the principle according to which all traffic on the Internet should be treated the same way, and not be given different priority according to its nature (apart from certain exceptions, such as emergency service traffic, or certain types of traffic management). A very thorough review of the issue, the literature on the issue, and early regulatory responses is given by Cooper (2013).

The recent regulatory actions by the US Federal Communication Commission (FCC 2015) and the Indian Telecom Regulatory Authority (TRAI 2016) illustrate how multi-stakeholder consultations can be embedded in traditional national democratic governance mechanisms. In both cases, there was very broad public consultation, both with "stakeholders" such as traditional telecommunication operators, mobile telephone operators, Internet service providers, companies that provide Internet applications (the so-called "over the top" providers such as Google, Facebook, etc.); and with the general public. Following those consultations, the regulators promulgated network neutrality

regulations tailored to the specific national circumstances. Those regulations can be challenged in court, on the grounds that they are not consistent with applicable law.

While the consultations were open and broad, the final decision was made by a government agency that, in the end, is accountable to the people through the national parliament and the national judicial system.

If the final decision had been subject to obtaining the consensus of all the "stakeholders", there would not have been a final decision, because several "stakeholders" oppose either network neutrality as a principle, or the specific version of network neutrality that was imposed by regulation.

The role of governments in ICANN is a bit different. Before turning to that, we first describe ICANN and the IANA function.

5. ICANN and the IANA function

A comprehensive account of the background leading to the creation of ICANN is given by Mueller (2002); a more synthetic account is given by Powers and Jablonski (2014, pp. 138-143); the official US account is given in NTIA (1998); a good account of the tensions involved is given by Malcomson (2016 pp. 130-137); analyses can be found in Mueller (1999), Froomkin (2000), Weber (2009). In essence, the initial discussions that led to the creation of ICANN focused on two specific issues: the lack of competition (at the time) in the domain name market and the difficulties for trademark owners to recover quickly domain names containing their trademarks. A solution proposed by a multi-stakeholder body, the Internet Ad Hoc Committee (IAHC) was unilaterally rejected by the US government, who instead called for the creation of what became ICANN. The IANA function (the global administration of the domain name system, IP addressing, and other Internet protocol resources), which long predated ICANN, was confided to the newly-created ICANN.

In accordance with the intent of the US government, the management of Internet names and addresses is fundamentally different from the management of names and addresses of other telecommunication technologies in two ways: (1) it is carried out by private-sector entities[3] and is partly carried out without any formal governmental supervision; (2) to the extent that there is formal governmental supervision, it is provided by a single country, the United States of America (Mueller 2002; WGIG 2005, paragraph 15; Kruger, 2013; Powers and Jablonski 2015, p. 143).

Thus it is not surprising that there have been numerous discussions regarding these two points: should governments be more involved in the management of Internet names and addresses? If not, then why is there a special role for the USA? The answer to the second question is of course well-known: the USA has a special role for historical reasons (Muller 2002), so the question became "Should all governments be excluded, or should all governments be included?" (Mueller 2015).

In response to those discussions, the US announced in 2014 (NTIA 2014) that it intended to transition the oversight of the IANA function to "the global multi-stakeholder community". The use of the term "community" is problematic because the concerns of the various stakeholders diverge significantly (Gurstein 2015).

In its announcement the US set certain conditions for the transition, conditions that were not directly related to the technical functioning of the Internet (e.g. the stipulation that the role of NTIA could not be replaced by a government-led or an inter-governmental organization solution, and, later, the stipulation that ICANN should

[3] While non-state actors, and in particular private companies, participate in, and heavily influence, discussions regarding telephony and radio spectrum matters at both the national and international levels (in particular in ITU), from a formal point of view decisions are made by governments, which is not the case for the Internet.

remain in the USA – see below). Those conditions were imposed unilaterally by the US government: there was no multi-stakeholder consultation leading up to the US announcement.

One of the conditions was that ICANN itself would convene the process to agree on the transition. The decision to ask ICANN to convene the process is not consistent with the multi-stakeholder model because it was taken unilaterally by the US government, without any prior consultations, and because it was widely held that ICANN was not sufficiently accountable (see for example ALAC [2012], Harris [2013]; Weber [2013] section 3.2(b); Corwin [2014]; Ontoyin et al. [2014]; Gross [2015]). A former ICANN director stated: "ICANN is in need of supervision and oversight. NTIA has not fulfilled that role so there is no loss should NTIA step aside. However, some oversight from somewhere is necessary" (Auerbach 2014).

As another commentator put the matter: "ICANN is a monopoly, and the problem with all monopolies, even nonprofit ones, is that they tend to put the needs of the organization ahead of those of the public. Although ICANN says it is accountable to the global community of stakeholders, there is little in place to actually back up this commitment" (Castro 2014).

It does not seem appropriate to ask a non-accountable entity to convene a process that was supposed to be accountable to the "global multi-stakeholder community", and this in particular when one of the key objectives is to develop new processes for the accountability of that entity and another is to consider the possibility of shifting some of parts of a key activity (the IANA function) to different entities or even to new entities.

However, it must be noted that, as part of the transition process, ICANN did agree to strengthen significantly its accountability, albeit primarily to its own constituency, see below.

5.1 The role of governments in ICANN

The purpose of this section is not to criticize ICANN per se, but to identify the specificities of ICANN's implementation of the multi-stakeholder model, and to show how those specificities are not necessarily appropriate for other aspects of Internet governance.

Despite the recognition of the role of governments regarding certain aspects of Internet governance, and the recognition of the role of governments with respect to issues relating to the numbering, naming and addressing of electronic communications networks and services (see for example EU [2002, Art. 10]), there has long been suspicion regarding the role of governments in ICANN (see for example Mueller [2015]). One might suppose that this is due to a belief that ICANN does not handle any public policy matters so there is no reason for governments to be involved in ICANN. But such is not the case.

There is no question that ICANN makes decisions that are matters of public policy. Its Governmental Advisory Committee (GAC) states: "The GAC's key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements" (GAC 2016).

Yet the GAC has no decision-making role: its role is limited to providing non-binding advice to ICANN's formal decision-making body, the ICANN Board (see

XI.2.1, letters j and k, of the ICANN Bylaws[4]). Thus ICANN was misquoted (or it misstated the matter) when it said: "ICANN will treat governments, companies and academics as equal stakeholders" (Liu 2016).

A minority of the GAC made the same point (ICANN 2016, paragraphs 19 ff.): governments have only an advisory role in ICANN, they do not participate in the selection of the ICANN Board and do not elect a member to the Board. The Board can reject GAC advice.

To the extent that one accepts that governments should be responsible for public policy matters, one might have doubts that the transition of the oversight of the Internet Assigned Numbers Authority (IANA) function represents a shining example of multi-stakeholder best practices, because the process of preparing the transition was delegated to ICANN, the transition does raise public policy matters (Kruger 2015), and, within ICANN, governments do not have the ultimate responsibility for public policy matters. Further, GAC has been criticized (ICANN 2016, paragraphs 63 ff.) for not being transparent or bottom-up.

6. The IANA Transition

We discuss in detail below the IANA transition process, because it is an important example of a multi-stakeholder process that addressed a long-standing issue: how to replace the historical US government oversight of the IANA function by a non-governmental model. The transition process was very transparent, and it was more open than traditional governmental and inter-governmental processes. Thus it is a good example of how multi-stakeholder processes can be used to discuss complex issues and arrive at widely-supported conclusions.

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[4] https://www.icann.org/resources/pages/bylaws-2012-02-25-en

Despite those positive points, we argue below that the IANA transition is not a good model for the future, because of certain specific failures. The analysis below should not be seen as a criticism of multi-stakeholder processes in general, nor of ICANN itself, but rather as an indication of what could be done better, or at least differently, in the future.

We focus on this particular process because it was initiated as a result of significant political pressure at the international level, because it is highly visible, and because, as explained below, some are putting it forward as a model for future processes.

6.1 The Process

In response to NTIA's call, ICANN chartered a body, the IANA Stewardship Transition Coordination Group (ICG). The members of that body were chosen by the various subgroups of ICANN and by selected other groups closely associated with the existing Internet governance arrangements: the group members represented 13 "communities", of which only five are not subgroups of ICANN; of those five, four are closely association with existing arrangements: the Internet Architecture Board (IAB), the Internet Engineering Task Force (IETF),the Internet Society, and the Number Resource Organization (NRO) (ICG 2014). Although the group accepted public comments, decisions were made by the members of the group. Thus the group was not open nor, as can be seen from its membership, was it truly inclusive (Venkataraman 2014). It would have been preferable to adopt an approach similar to that of the IETF: fully open and egalitarian. If consensus could not be reached, then the divergent views would be presented as options to the decision-making entity (in this case NTIA).

The ICG decided that the transition proposal would consist of three separate sub-proposals, each dealing with one of the three main types of Internet identifiers

managed by IANA: protocol parameters, IP addresses, and domain names (ICG 2014b).

The ICG decided that the proposal for protocol parameters would be developed by the

Internet Engineering Task Force (IETF); the proposal for IP addresses would be

developed by the Regional Internet Registries (RIRs); and the proposal for domain

names would be developed by ICANN itself.

As explained below, this was not entirely an open multi-stakeholder process.

The IETF is not a multi-stakeholder body in the traditional sense, because its

participants are individuals, not entities such as private companies, governments, or

civil society organizations (IETF 2016), and they speak as individuals, not as

representatives of stakeholders. On the other hand, the IETF is fully open: anybody can

join the discussions and attempt to influence the decisions (even if this may be difficult

in practice, see Drake [2011], Chenou and Radu [2013, p. 195]; Gurstein [2013];

Powers and Jablonski [2015 pp. 149-152]).

The RIRs are also not multi-stakeholder bodies: they are comprised of Internet

service providers. Even though anybody can join their discussion lists and attempt to

influence decisions, decisions are made by a governing group that is selected by the

members (the exact processes differ for each of the five RIRs). Open mailing lists were

created to discuss the IANA transition, but decisions regarding the IANA transition

proposal were made by a group whose members were selected by the RIRs (CRISP

2016). Since the RIRs are not multi-stakeholder bodies, the CRISP team was not

representative of "the global multi-stakeholder community".

ICANN created two groups to prepare the sub-proposal regarding domain

names. Both groups had two types of members, "members" with decision-making

powers, and "participants" without decision-making powers. The decision-making

members were selected by the various sub-groups of ICANN. (See CWG-Stewardship

[2016] and CCWG-Accountability [2016]). This is not consistent with the principle of openness that we consider to be a best practice for multi-stakeholder processes.

While it was sensible to break the IANA transition process into separate parts, and to mandate the most directly concerned entities to prepare proposals, it would have been preferable to allow much more scope for open, public, discussion of the outputs of those concerned entities. That is, it would have been preferable if the three separate sub-proposals had not been considered to be final work not to be modified, but instead inputs for a much wider multi-stakeholder consultation.

6.2 The Work

All the groups mentioned above created mailing lists: one for the IETF group, five for the RIR groups, one for the Numbering Resource Organization (NRO, comprised of the RIRs), 16 for CWG-Stewardship, and 14 for CCWG-Accountability. Each of those mailing lists was very active, with hundreds of messages. In addition to the online discussions, there were numerous face-to-face meetings, in particular for CWG-Stewardship and CCWG-Accountability. For example, the work of CWG-Stewardship included, during one year, over 100 calls or meetings, 4,000 email messages and at least 5,000 volunteer hours (CWG-Stewardship Chairs 2015). Overall, more than 26,000 working hours were spent on the proposal, more than 33,000 messages were exchanged on mailing lists, and more than 600 meetings and calls were held (NTIA 2016).

The volume of work was such that only dedicated participants could meaningfully influence the process, which contradicts one of the best practices of multi-stakeholder processes: anybody who wishes to participate should be able to influence the outcome. And it also begs the question of how to implement multi-stakeholder processes when time and money are real constraints.

Not surprisingly (as noted by an experienced ICANN participant [Stoll 2016]), the discussions regarding the IANA transition were dominated by those stakeholders who had a commercial interest in the outcome. Actual participation on the open mailing lists did not reflect the composition of the "global multistakeholder community", as shown below by anecdotes and actual data on who participated. The witnesses at a hearing in the US Congress regarding the final version of the proposal were all representatives of groups who would be expected to support the proposal (ECC 2016), even if some of the witnesses in a subsequent hearing (CST 2016) were staunch defenders of the status quo: Mueller (2016) criticizes their arguments in favor of retaining US government oversight of the IANA function.

As one long-time participant in ICANN-related discussions put the matter: "I am personally distressed that representatives of a few corporations with very significant commercial interests in the outcome of the Transition, have been allowed to participate unrestrained, whereas in any other context that would have given rise to questions as to the risks of collusion and anti-competitive behaviour. For my part I have felt cautious about engaging thoroughly with CWG for that reason. I fear that the eventual outcome of CWG is ipso facto tarnished with the risk of collusion" (Wilkinson 2015).

Another long-time participant in many aspects of the Internet and its governance stated that the actual participants in ICANN tend to come from a relatively narrow range of organization which are active in the domain name business and which are not representative of "the global multi-stakeholder community", or even of "the multi-stakeholder Internet community" (Klensin 2015).

A more detailed analysis is provided by Prakash (2015):

If one counts participation across the main lists where the final shape of the ICG proposal were thrashed out (ICANN's ICG and CWG-Stewardship lists, the NRO's IANAxfer and CRISP list, and the IETF's IANAPLAN), then a total of 239

individuals participated. Of these 239, only 98 substantively contributed to the final shape of the ICG proposal, if one takes a count of 20 mails (admittedly, an arbitrary cut-off) as a substantive contribution, with 12 of these 98 being ICANN staff some of whom were largely performing an administrative function.

Of these 98, 39 (or 1 in 4) were, as far as one could ascertain from public records, from a single country: the United States of America.

Of these 98, 77 (or 8 in 10) were, as far as one could ascertain from public records, participants from countries which are part of the WEOG UN grouping (which includes Western Europe, US, Canada, Israel, Australia, and New Zealand), which only has developed countries.

None of those who participated substantively were from the EEC (Eastern European) group and only 5 of 98 from GRULAC (Latin American and Caribbean Group).

Of these 98, 77 (or 8 in 10) were male and 21 were female, as far as one could ascertain from public records.

Of these 98, 76 (or 8 in 10) were identifiable as primarily being from industry or the technical community, as far as one could ascertain from public records, with only 4 (or 1 in 25) being readily identifiable as primarily speaking on behalf of governments.

Lastly, the processes followed by ICANN and the NRO (CRISP) did not allow for equal and open for participation by all relevant parties.

Despite these public comments, and even before the various groups had finished their work, the US government announced that, in its view, "there is a substantial amount of consensus support for the goals and principles established by the two working groups that have led the planning efforts since last year" and proceeded to give guidance to the groups regarding how to bridge the differences that did exist (NTIA 2015, McCarthy 2015).

But in fact the outcomes did not reflect the full consensus of those who commented. There were numerous dissenting comments submitted to the ICG[5] (see for example JNC [2014, 2015, 2015a, 2015b], Laprise [2015], Prakash [2015]). Further, it can be seen from the detailed compilation of the public comments regarding the CWG-Accountability proposal (CCWG-Accountability 2016a) that 17 of the 51 responses to the survey (33%) did not support at least one of the 12 recommendations contained in the proposal. (The cited spreadsheet refers to the recommendations as "areas" and it tabulates only the cumulative disagreement, showing that 85 of the 612 responses (14%) regarding the individual recommendations indicated no support. This understates the level of opposition, so the authors have computed the number of responses that did not support at least one of the recommendations. There was no public comment following the publication of the final version of the report, but the final version was essentially the same as the version for which there had been public comments, so the author assumes that the objections expressed during the public comment period apply also to the final version.)

Even more telling, the final report of the CCWG-Accountability did not achieve full consensus even amongst the decision-making members of the group (ICANN 2016). But there were no formal objections when it was presented to the ICANN constituency for formal approval, so logically the ICANN Board approved the proposals. (In fact the Board had influenced the process [Schaefer 2016] , so it is not surprising that the final outcome was acceptable to the Board.)

While ICANN's actions and decisions cannot be criticized under ICANN's rules, that does not imply that the process was representative of a true multi-stakeholder

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[5] The archive of comments for the ICG proposal is at: https://www.ianacg.org/calls-for-input/iana-stewardship-transition-proposal-public-archive-of-submitted-comments/

approach. As noted above, the process was not fully open, nor fully representative. It would have been preferable not to mandate ICANN to conduct the process, the best alternative being probably an ad hoc process created by a preliminary multi-stakeholder process.

6.3 Lobbying and the role of the US Congress

It is worth noting here that ICANN (2015) has published a very clear summary of the expenses it has incurred for the IANA transition, including lobbying and "education/engagement", that is, it was transparent. Lobbying was $765,000. Education/engagement was $1 million. Legal advice to ICANN was $1.1 million, and legal advice to the working groups was $4.8 million. Amongst the firms retained for "education", Albright Stonebridge is headed by former US Secretary of State Albright. Edelman states that it is the world's largest PR firm. Rice Hadley Gates is headed by former US Secretary of State Rice and former US Secretary of Defense Gates (Hadley is a former US National Security Advisor).

The engagement of such prestigious lobbyists was no doubt motivated by the tendency of the US Congress to meddle in the transition process, and this by exercising its power as a parliament, and not by participating like any other stakeholder. For example, the US Senate (2015) adopted a resolution that placed conditions on the IANA Transition; several committees or subcommittees held hearings on the transition (JC 2015; ECC 2015; CST 2016); a Representative (Kelly, 2015) proposed legislation and submitted it to the CCWG-Accountability (the legislation was not adopted); three Senators (one of whom is influential and was running for President) wrote to the Chairman of ICANN to enquire about how ICANN would interact with China after the transition (Cruz, Langford and Lee 2016).

Further, in response to pointed questions, the NTIA Administrator told the US Congress that a condition for the transition would likely be that ICANN and IANA remain in the USA (ECC 2015a, video stream at 45'57 and 46'50; see also the statement by Rep. Walden at 24'28).

The various maneuvers in the US Congress were not ignored by the groups working on the transition. On the contrary, some influential participants in the process actively welcomed the Congressional meddling (DelBianco 2015) and took steps to get expert advice regarding the political realities in the USA (Holly, 2015). Ermert (2016) reports on the emphasis to approval by US authorities given publicly by the leaders of the process that prepared the transition proposal. NTIA (2016) confirmed that US authorities would carefully examine the proposed transition before approving it, and the US Congress held hearings regarding the proposal (ECC 2016; CST 2016). DelBianco (2016) summarizes well the extensive attention given by the US Congress to the transition.

If ICANN's activities and decisions were primarily related to US domestic matters, then of course supervision by the US Congress and US government would be appropriate, and indeed a normal and necessary element of democratic governance. But ICANN's activities and decisions have global effects. Thus interference by one national parliament to the exclusion of other national parliaments is not appropriate, and is not consistent with the concept of multi-stakeholder processes.

It would have been preferable if the NTIA had obtained the preliminary agreement of the US Congress not to interfere with the transition.

6.4 The Outcome

Not surprisingly in light of the above, while the final proposal of CCWG-Accountability was largely supported within ICANN, and also in the public comment phase, some are

of the view that it does not create any meaningful oversight of ICANN and that it increases the dominance of the domain name and addressing industries (JNC 2015):

> … the "empowered community" would consist of 5 organizations: ALAC, ASO, GNSO, ccNSO, and GAC. Each of these organizations is an organic component of ICANN, and the majority of them represent the domain name and addressing industries.
>
> Thus, the proposal does not provide for any external accountability or supervision of ICANN: ICANN would be accountable only to entities that are part of ICANN.
>
> In March 2014, NTIA announced that it intended to transition key Internet domain name functions to the "global multistakeholder community"
>
> An entity (the "empowered community") that consists of organizations that are organic components of ICANN is obviously not "the global multistakeholder community", nor can it be construed to be representative of that community when 3 out of 5 of the cited organizations represent the domain name and addressing industries.

Auberbach (2014) takes a similar view, stating that the proposed IANA transition will further exacerbate ICANN's use of "its de facto monopoly position to do a land office business selling rights to internet territory".

The French government characterized the transition as a "privatization" (Chaffin 2016). But it should not have been surprising that the transition was a privatization, because principles enunciated when by the US government when ICANN was created were "stability, competition, private bottom-up coordination, and representation"; the US government viewed the creation of ICANN as "transition to private sector management" of the IANA functions; and "the U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management" (NTIA 1998). And indeed the official US government report on the transition process states that it is the final step in the privatization of the domain name system (NTIA 2016a) and the US Congress also referred to it as "privatization" (ECC 2016).

Under the proposed transition, the IANA functions will remain under the control of the United States, albeit less directly that at present, because ICANN, and IANA, will remain under the jurisdiction of the USA, and thus will be subject to US laws and US courts (for a recent example of a court ruling affecting the domain name system, see PRLog [2016], ICANN [2016a]). Furthermore, it appears at present[6] that no changes will be made regarding the operation of the authoritative root zone file, which is subject to a separate contract with the US government (Kruger 2013, p. 5), so the US government will retain supervision of that function. (The authoritative root zone file is the master file that is replicated in all the root zone servers around the world; any change in that master file is automatically replicated around the world.)

A continuing special role for a single state, the absence of public policy oversight by governments, and the dominance by the domain name and addressing industry are not consistent with the WSIS-agreed role of governments nor with the best practices for multi-stakeholder Internet governance processes.

Thus, contrary to the statement of a senior US government official (NTIA 2016), a successful outcome of the IANA transition cannot serve as an example to the world that the multi-stakeholder model can be used to address Internet governance issues, even if it is an example of how a particular version of the multi-stakeholder model can

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[6] Subsequent to the submission of this paper for publication, it was announced that the US government would not continue its contract for the operation of the authoritative root zone file. ICANN and Verisign entered into an agreement regarding that operation. See Mueller, M. 2016. "'Inextricably Intertwined:' The ICANN-Verisign Root Zone Management Agreement". *Internet Governance Project*. 1 July 2016. http://www.internetgovernance.org/2016/07/01/inextricably-intertwined-the-icann-verisign-root-zone-management-agreement/

be used to address a difficult issue and propose a solution that has broad, but not unanimous, support amongst a certain set of participants that represent a certain set of interests.

7. Conclusions

As shown above, the IANA transition is not a good example of what multi-stakeholder processes should be in general, even if it was successful in some respects. Recent national decisions regarding network neutrality are better examples of multi-stakeholder best practices for Internet goverancne. Thus efforts should be made to map those national best practices to the international level.

The last thing we need at the international level is "many little ICANNs", contrary to what has been suggested recently (Economist 2016). That article states: "If this [IANA transition] goes ahead, a crucial global resource, the internet's address system, will soon be managed by a body that is largely independent of national governments. And some of ICANN's champions reckon this is just a start. In future, similar outfits could be tasked with handling other internet issues that perplex governments, such as cyber-security and invasions of privacy."

As noted above, this flies in the face of the WSIS agreements; of the principle that offline laws apply equally online; of multi-stakeholder best practices; and, more importantly, of the very principles of democracy: representation in decision-making and the rule of law.

Extrapolating the IANA transition to other aspects of governance would be a continuation of a dangerous trend towards giving more and more power to private companies that is eroding democracy (McChesney 2013), is creating economic problems (Schiller 2014), and is unsustainable (McChesney and Nichols 2016).

Acknowledgments

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