Internet Governance
- with particular reference to ICANN and the European Union -

How will the global Internet be developed and controlled in the future?

Preface:

This paper was written before the recent statements by <u>US NTIA</u> and the <u>European Commission</u> regarding the globalisation of the IANA function. However, since these statements call for "ICANN to convene global stakeholders to develop a proposal ..." and for "the development of a multi-stakeholder model ...", it would appear that the following considerations remain relevant.

More generally, this subject has in recent weeks been a moving target. This paper will rapidly become outdated, and need revision after the Singapore ICANN meeting and NETmundial in São Paulo.

Background:

The public Internet has been with us for only about 20 years, and for many of us for far less than that. Nonetheless today the Internet is regarded almost as a general utility such as the electricity and water supplies. However, the Internet cannot be taken for granted. It works as we know it through a complex network of networks relying on detailed common technical standards, extensive global communications infrastructure and vast numbers of end points in the form of computers, telephones and other appliances. How all this is to be managed in the future has become a major issue in international politics and economics. On the one hand governments of all colours and tendencies are seeking to control the use of the Internet and/or to spy on how the Internet is used, not only by criminals, but also by the general public. On the other hand, commercial activity on the Internet has given rise to vast financial interests, unprecedented monopolies and enormous economic threats to established businesses, whether off-line shopping streets or traditional telephone companies.

Thus, a theme that was considered fifteen years ago as arcane, if not irrelevant, has today taken centre stage, in the United Nations, in the European Union and among the global Internet community, broadly defined.

Summary:

This paper addresses contemporary aspects of Internet Governance (in the recent past and for the foreseeable future) in the context of several initiatives globally and in Europe. The subject is indeed a moving target; new initiatives emerge almost weekly. Links to a selection of recent papers and events are attached in Annex 2 to this paper. Participation in all these initiatives appears to be self-selecting and at best rather opportunistic if not disorganised. In parallel, a number of websites and discussion lists with broader participation - some claiming to represent particular stakeholder groups – attempt to keep up with events, if not to influence possible outcomes.

For present purposes (March 2014), the following conclusions can be identified:

1.   The **ICANN** (1) community needs to identify and implement a globally neutral and accountable multistakeholder management system for the naming and addressing of the Internet (DNS). This has to be autonomous from the pre-existing US NTIA/DoC oversight, independent of the ITU, and fully responsive to the public interest. The leading organisations involved, notably the custodians of the Root Servers, should not otherwise be operators of commercial Internet services.

2.   **Multistakeholderism**, particularly the Civil Society component, needs to have a more balanced and transparent *modus operandi*. At present a few stakeholders, indeed individuals, enjoy and exercise disproportionate influence. At the same time, Civil Society representation is either marginal or absent. In any event it is divided: for instance, one can identify at least six distinct e-mail discussion lists currently attempting to address the public interest aspects of the Internet (2)

Should the necessary balance not be achieved – soon – then it becomes increasingly clear that governments world-wide will no longer accept their tacit delegation of regulatory powers to multistakeholder entities and decision-making processes. The consequences would be not be good for the Internet because, other than a multistakeholder public-private partnership, there would appear to be no international consensus on maintaining the global Internet. On the contrary, the failure of the present system would not only involve a transfer of power from the Internet to the governments, it could also result in the regionalisation, if not fragmentation of the Internet. The stakes are high. As has recently been said: "It is payback time."(3)

3.   Turning specifically to the **European interest** in these matters, a primary recommendation from this paper is to ensure that European and EU Institutional participation in ICANN and other current IG processes, is comprehensive and proactive at all levels in the emerging system(4). It is important that this takes place not only among steering committees and panels but also among the multistakeholder membership and participation, including the EU and the Member States' (5) public and private participants. These issues have also been recently addressed by the European Commission Communication COM(2014)72 final (see below).

4.   If the multistakeholder model is to be maintained, greater efforts are required to ensure that **the public interest** is effectively represented at all stages in the bottom-up decision making process. At present the participation of civil society and Internet users is undermined for lack of resources.

---

1.   Internet Corporation for Assigned Names and Numbers (ICANN).
        Annex 3 contains a list of abbreviations and acronyms used in this paper, in the order in which they appear.
2.   For instance: governance@lists.igcaucus.org
        bestbits@lists.bestbits.net
        discuss@1net.org
        at-large@atlarge-lists.icann.org
i   nternetpolicy@elists.isoc.org
        giganet-members@listserv.syr.edu
3   .   Speech by the Swedish Minister of ICT, 19 February 2014.
4   .   N.B. Sources in Brazil suggest that the São Paulo conference may comprise as many as 1000 participants.
5   .   The selection of participants in the São Paulo preparatory committees went through an obscure process
        apparently addressed to the 1Net group. The current status is unsatisfactory: ICC has designated 5 business
        delegates, all US based; civil society representation is unclear; recognisable European participation is limited.

If the European Commission and the EU Governments consider that the outcome of multistakeholder decision making is inconsistent with the public interest, then either a significantly greater place must be afforded to civil society and Internet user interests in Europe and globally, or the public authorities have to participate directly at all levels of the bottom-up decision making process. Or both.

*   *   *

1.   Introduction

Internet Governance is in flux following the WCIT in Dubai in September 2012 and the ICANN meeting in Buenos Aires in November 2013. A new push for further internationalisation of ICANN had been announced, and has now been given additional urgency in the context of the current surveillance scandal. Although multistakeholder management of the DNS, on the one hand, and covert surveillance of communications, on the other hand, are essentially distinct issues, they have been largely assimilated in the public mind, internationally, because of the location of the DNS Root Servers and the global topography of the Internet backbone. Also, 'governance' today extends beyond the DNS, narrowly defined, to include – even in the ICANN context – unavoidable legal, cultural and even political considerations. Most Internet Governance issues today are not technical.

In recent weeks, several new fora, study groups and task forces have been convened. One group, the [High Level Panel](#) chaired by President Toomas Ilves, met in London 12-13 December 2013, and met again in early 2014. A second [global Internet Governance panel](#) has also been announced, Chaired, this time, by Carl Bildt, Foreign Minister of Sweden.

A multistakeholder conference has been announced in conjunction with ICANN and the government of Brazil to take place in São Paulo in April 2014. Following the statement by the I* entities in Montevideo, another group called 1net has been set up.

Most of the relevant Links and other references are included in Annexe 1 to this paper. A comprehensive overview of this process (as of December 2013) has been prepared by the ICANN Brussels office and is available [here.](#)

In the course of 2014, numerous international meetings can be identified which will relate in one way or another on the future of the Internet. Thus, in addition to the complexity of the subject matter and the multiplicity of relevant fora, for the foreseeable future, Internet Governance is going to be a moving target.

Hopefully, it may become easier to track and participate in all these developments through the [Global Internet Policy Observatory](#) (GIPO), to be set up by DG Connect of the EU Commission.

2. Internet Governance issues

There is no simple way of classifying Internet Governance issues. This paper will focus on relatively short term issues, particularly as they affect ICANN and the EU. But one should not loose sight of the fact that this is currently in a much broader context of a wide range of issues that will

affect the governance of the Internet for a long time to come.

2.1 **The current functioning of ICANN, particularly regarding the new gTLD programme.**

ICANN's primary responsibility is to maintain the stability of the Internet. During the past 15 years this has been achieved in the context of continued rapid growth of the Internet, world wide. This primary objective has justified a certain conservatism regarding the DNS in general and the creation of new TLDs in particular. The large expansion of gTLDs which is now under way is thus a major innovation. For more than a decade, the Internet community was authoritatively told by technical specialists that the stability of the DNS would be put at risk by an overly rapid and far-reaching increase in the number of TLDs. Recently, Esther Dyson and Vint Cerf (6) have confirmed that this was their point of view. One illustration of this conservatism has been the detailed consideration and the time taken (some would say delays) before any IDN (7) TLDs could be entered into the Root. Furthermore, few new TLDs in recent years have been successful from an economic point of view, suggesting limited user interest in domains such as .coop, .biz, .name, .mobi, .pro, .travel etc. In practice only .info, .eu and - on a different scale - .cat, have come up to (or exceeded) their initial expectations.

Thus, the current radical change in policy begs the question as to what exactly are the changes in technology and administration of the DNS that have taken place to justify the new policy? Particularly as the size and configuration of the Root Server system appear not to have changed very much, except for growing numbers of mirror sites which have been implemented world-wide, meanwhile.

However the change in policy has given rise to several procedures and decisions by the ICANN Board, on the basis of policy development procedures (PDP) through the Generic Names Supporting Organisation (GNSO), constituted essentially by the Registries and Registrars (8), some of which give rise to questions:

-         overturning the previous policy of Registry-Registrar separation and allowing reverse integration by Registrars, becoming their own Registries.

-         very high application fees for new TLDs which have effectively excluded many not for profit and community based applications; very few applications from developing countries in spite of the priority for .IDN TLDs and the availability – in principle – of favourable application fees in certain circumstances; associated auctioning of TLDs applied for by more than one entity;

-         giving a green light to new TLDs which are based on generic words, some of which will be closed Registries. Many new gTLD Registries are incorporated in tax havens.

---

6   Previous Chairs of the ICANN Board.
7   .   Internationalised Domain Names (IDN), i.e. Domain Names and TLDs expressed in non-latin characters.
8   .   The Non-commercial stakeholders constituency (NCUC) is also a member of GNSO.

- inexplicable inconsistencies in the ICANN process regarding ccTLD IDN 'fast track' decisions (9);

- failure, to date, to recognised geographical indications in the same way as territorial trademarks.

- questions as to the effectiveness of the ICANN conflict of interest policy as it might be applied to Board members and senior staff.

Thus it would appear that some of these ICANN decisions could be appealed or reviewed. More generally, the multistakeholder structure of ICANN's bottom-up decision making process is not functioning correctly from the point of view of the public interest. As a result, there have been several instances of ex-post disagreements between the ICANN Board decisions and the point of view of the Governmental Advisory Committee (GAC). Possible explanations include delays and uncertainties in establishing the GAC positions, absence of timely governmental input in the PDP, and lack of balance between the commercial interests in the GNSO on the one hand and the public interest constituencies on the other hand. The latter being currently divided between the Non-Commercial constituency on the one hand, and the At Large membership and ALAC (At Large Advisory Committee) on the other hand.

In any event, to be clear, either the public interest oriented stakeholders must be given sufficient space, representation and resources to effectively ensure that ICANN respects the public interest, or the governments – through the GAC – will have to take much more responsibility for representing the public interest throughout the the ICANN policy development process.

2.2 US Government (DoC/NTIA) control over the Internet Root

US government control of the DNS Root, through a service contract with ICANN to manage the IANA function, has been a long-standing issue for many countries:

– in the 1990's the EU accepted that this situation would be maintained for the time being, as being part of the best deal the EU could get (10), whereas other aspects of internationalisation of ICANN were achieved at the time (11). The Clinton administration was not prepared to take the issue to Congress, and insisted on a 'transition' that remained within the executive powers of the Administration.

---

9   .   e.g. .EU in greek and cyrillic; .BG in cyrillic
10 .   And in the light of the alternatives: either a US private sector Root heavily lobbied for by Network Solutions Incorporated (NSI) – subsequently Verisign - , or a Geneva based Root, sponsored by the ITU.

c.f. IFWP Geneva meeting July 24-25, 1998. At the time RIPE and European ccTLDs opted for an ICANN based on IANA, i.e. Jon Postel, in Marina del Rey, L.A.
11 .   Respect for International and local law, enshrined in the ICANN Articles of Incorporation; international composition of the ICANN Board; global multistakeholder ICANN structure.

Nevertheless, European participants expected that this position would evolve positively when ICANN had stabilised and become accepted by the Internet community in the US and world wide. However, successive US administrations did not move forward, and the EU did not take this up, politically, as a bilateral issue (12).

Replacing unilateral US control over the DNS Root was one of the motivations for the move in the WCIT to transfer responsibility for Internet Governance to the ITU. Although the issue appears to have been shelved in the ITU context (but may reappear at the 2014 Plenipotentiary), it remains a live issue for several countries.

Most recently, the initiative between ICANN and Brazil (13)to set up the São Paulo conference in April 2014 is ostensibly attempting to find a solution to this long standing issue, of particular concern to the BRICS among other countries. Needless to say that this issue has been aggravated and accelerated by the surveillance crisis, although as noted above, they are distinct.

On the other hand, the strength of the status quo is that it has worked for a number of years. The Internet DNS has remained stable, in spite of very substantial growth. As far as we know, the US government has not intervened politically in a way to affect the decisions of national governments or of ICANN/IANA. The governments' positions regarding their ccTLD Registries have been respected. To date, the rest of the world (including the EU) have not had a viable alternative; given that the ITU/UN option is not accepted by a wide range of countries, including the EU (14).

One step that could be undertaken without difficulty would be, at least, to transfer the physical control of the primary Root Server from Verisign (successor to Network Solutions Inc. - NSI) to a neutral platform. It has always appeared anomalous that this element of critical Internet infrastructure should be hosted by the dominant gTLD operator, notwithstanding contractual supervision by the US government. The transfer could be made to ICANN itself or to another mutually agreed, alternative neutral platform.

However, the control over the primary Root Server is largely a symbolic issue. Far more important in practice is the predominate influence in ICANN of US-based interests. That can best be corrected in the short term by a vigorous implementation of the current ICANN CEO's announced accelerated internationalisation of ICANN and by enhanced participation by non-US stakeholders. It has been clear for several years that unless this can be achieved, tweaking the control over the Root Servers will be to little avail in practice. This urgent matter is addressed by the recent European Commission Communication (see below).

Subject to the outcome of the current wave of conferences and expert panels, it is likely that any further evolution will proceed in stages. The US would regard the current Affirmation of

---

12 .   e.g. in the periodic bilateral summits or the high level ICT consultations
13 .   Following the Brazil President's speech at the UN
14 .   It is worth recalling that in addition to the formal question of authorising changes to the Root zone file, there is a substantial, physical, technical network which implements the Root and related software. These include, the primary Root server in Verisign, a number of other Root servers in the US (only three are elsewhere: NL/UK, SE, JP) and their respective security and interconnectivity and the quasi-automatic distribution of the Root Zone file to scores of mirror sites world-wide.

Commitments procedures (AoC I and II) as being steps in the right direction, diluting if not divesting US control over ICANN. It remains to be seen to what extent the pressure arising from Brazil *et al* will accelerate the process, and what role the GAC will fulfill in the future.

Meanwhile, and most recently, US NTIA has announced its intention to withdraw from direct control of the IANA function, subject to certain preconditions.

3.   The European Union

Since the inception of ICANN in 1998, the EU and the Member States have, through the European Commission, taken a leading role in Internet Governance and in the ICANN Governmental Advisory Committee (GAC). However, in recent years, the volume, intensity and rhythm of issues passing through ICANN and the GAC appear to have overwhelmed many GAC members, not excluding the EU. Furthermore, the budgetary crisis within the Commission has put unreasonable limits on the staffing (and essential travel) of the Commission staff concerned. This is becoming a serious issue because the degree of policy influence that the Commission is seeking in the GAC clearly requires a more timely and extensive input from the Commission and Member State governments, both on-line in the PDP processes as well as in the ICANN meetings.

A high level of active and preemptive coordination between the Commission and the Member States through the Informal Internet Group (IIG) and the High Level Group is necessary. When policy is agreed, it should be possible to spread the workload among the Commission and the Member States' delegates. Otherwise, at best the GAC, including the EU participants, will continue to be perceived by other constituencies as "Jonny-come-lately" in the PDP process, and at worst certain interest groups will continue to run rings around the public interest objectives that are the responsibility of the ICANN Board, the GAC, the At Large and the NCUC.

EU delegates participating in the ICANN review mechanisms such as the ATRT-2 also need to communicate with, consult with and report to the multistakeholder community in Europe. At present there is hardly any feed-back mechanism in these areas. The EU could also monitor European private sector participation in the supporting organisations and advisory committees and prompt corrective action should the need arise.

For the first few years of ICANN's existence, European participation at all levels, was monitored and when necessary organised by the European Commission. One manifestation of the importance of the Commission to ICANN at the time was the opening of the Brussels ICANN office and the appointment of a senior Commission official as Vice President and initial Head of the Brussels office. However, recent indications are that ICANN is moving some of its work in Europe from Brussels to a new office in Geneva.

In this multistakeholder context, participation by civil society and Internet user interests is necessary. These matters are crucial for our future as societies, families and individuals. The users interests are an integral part of the political aspects of Internet Governance. This is beginning to be recognised, as the recent European Commission Communication suggests, but the necessary participation is undermined by insufficient participation arising principally from lack of financial support for not-for-profit and civil society participation which – as a result – is often (a) limited to

those participants who can charge their time, travel and subsistence to another entity (such as a university or an NGO) or (b) are local to an ICANN meeting, which occurs in Europe, usually, not more than once every two years (15).

Thus, a primary recommendation from this paper is to ensure that European and EU Institutional participation in ICANN and other current IG processes, is comprehensive and proactive at all levels in the emerging multistakeholder system. It is important that this takes place not only among the ICANN Board, its steering committees and panels, but also among the multistakeholder membership and participation, including the private sector and the EU Commission and Member States (16). More generally, the Commission services should be encouraged to devote resources to Internet Governance and ICANN at least on a par with the resources which other Directorates General can devote to WTO and bilateral trade negotiations, OECD and similar international fora (17). It would be inconsistent for Europe to argue for the multistakeholder system to be maintained and developed whilst allowing its own participation to become under represented.

Furthermore, insofar as other governments will continue to press for an ITU competence in the general area of Internet Governance and ICANN in particular, it has become ever more essential than it was before that the EU should become a full member of the ITU. This is necessary, even if the EU's policy – as recently confirmed - is to resist an ITU presence in Internet Governance. (18)

With this background in mind, the European Commission's recent Communication is a timely restatement of EU policy for Internet Governance. The Communication launches a proactive process which should lead to a more effective EU presence in global Internet Governance and in ICANN. However the Commission is quite cautious as to the possible outcomes, not least because of the limitations on human and financial resources (Footnote 9 of the Communication). As a prelude to this Communication, the Commission issued a ten-point summary of Internet Governance Principles (see annex 1) which followed up on the 2011 Compact Principles.

The main points of the new Communication may be summarised as follows:

– respect for **fundamental rights.** *"As enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the EU Charter of Fundamental Rights."* (Footnote 8 of the Communication.)

– the **single network**. Critical for the global Internet and for the correct functioning of the EU on-line Internal Market. But much still needs to be done to harmonise the laws and norms that apply; even within the EU, not to speak of with the rest of the world.

---

15 .   Exceptionally there will be an ICANN meeting in London, June 2014 and another one, probably in Italy in the autumn of 2015.

16 .   The selection of potential participants in the São Paulo preparatory committees went through an obscure process apparently addressed to the 1Net group. The initial status was unsatisfactory: ICC designated 5 business delegates, all US based; civil society is debating their representation on several distinct Lists; recognisable EU participation appears to be under-represented.

17 .   For instance, it is striking that there is currently no EU elected officer (Chair or Vice Chairs) in the GAC.

18 .   There would also be collateral advantages in other areas of the ITU such as ITU-R.

– the **multistakeholder model**: Indeed, but if this is to become more than a *'mantra'*, additional policy steps are necessary, in the IGF, in ICANN and even in the EU itself. In the global context, much greater efforts and resources are necessary to achieve recognisable representation and balance in multistakeholder 'bottom-up' decision making processes. It will not be enough just to facilitate 'remote' participation. Furthermore, the EU needs to recognise and implement that the multistakeholder principle applies to <u>all</u> policy domains affecting the Internet in Europe; not only those which happen to pertain to DG Connect. (19) The Commission calls on stakeholders to promote international outreach in this area.

The Commission will also launch a **broad consultation** as to how to ensure multistakeholder involvement. This consultation could prove to be a significant benchmark for the future, provided that participation in the consultation itself is balanced and representative.

– **Technical Norms and Standards:** Although the Communication does not refer explicitly to IETF, the EU ICT standardisation policy is incorporated into the policy, including privacy by design, IDN and accessibility standards.

There is a tacit recognition that the European Internet industry needs to participate more effectively in the development of open internet standards (20).

- **Trust and Confidence:** The Communication refers to several sources of distrust, including surveillance and seeks rapid adoption of several legal measures under consideration. Strengthening Internet Governance is " ... an essential prerequisite for a sustainable future for an open Internet."

- **Conflict of laws:** The Commission will continue to address long-standing issues in this area, including an in-depth review.

The Commission Communication is most welcome, in spite of an inevitable element of *'ratrappage'*. Indeed, many of the current issues were identified by the Commission in the original 2000 Communication on the Organisation and Management of the Internet, which gave rise to a Council Resolution which notably called *inter alia* for the Commission to:

"- set up a European network bringing together the scientific, technical and legal skills that currently exist in the Member States with regard to domain name, address and Internet protocol management."

Had that been done at the time, and maintained meanwhile, as a nucleus of a multistakeholder platform, Europe would be in a better position today.

Although the Communication on Internet Policy and Governance is reserved in the matter of surveillance, this is not the case for the European Parliament. While the global reverberations of the

---

19.   In this context one may recall that we have recently witnessed the collapse of the ACTA negotiations precisely because of the lack of transparency and participation.
20.   The Communication resolves the long-standing debate about whether or not "Internet" has a Capital Letter: the elegant solution is that the Noun is 'Internet', and the Adjective is 'internet'. Cool!

NSA revelations are still being played out, one may also note the [recent report](#) from the European parliament's LIBE committee (21). Whilst the report as a whole (pp. 52) is almost entirely devoted to human rights aspects of surveillance, the report also addresses Internet Governance:

(Para. 92) Calls on the Commission and the EEAS (22) to take action at the international level, with the UN in particular, and in cooperation with interested partners (such as Brazil), and to implement an EU strategy for democratic governance of the internet in order to prevent undue influence over ICANN's and IANA's activities by any individual entity, company or country by ensuring appropriate representation of all interested parties in these bodies;

The Explanatory Statement includes:

Action 7: Develop the EU as a reference player for a democratic and neutral governance of Internet;

Thus it is possible that the European political interest in Internet Governance may now extend beyond the established agenda to include fundamental rights and international relations. (23)

4.   Multistakeholder or multilateral governance?

Much is being made these days about alternative governance models, between multilateral governance, which essentially means inter-governmental decision making (e.g. the ITU, WTO among other entities) and multistakeholder governance methods which set governments as one of the stakeholders among others.

Thus, the 'multilateral' option would tend to move Internet Governance into an inter-governmental forum either by attaching it to an existing institution, in which case the United Nations is an obvious choice, or through a new international treaty, which would create a specific and original forum. In practice, this option tends to be preferred by governments which are either intrinsicly authorititive or which do not have influential stakeholders whether in the private sector or in civil society. The principal pre-existing UN agency in telecommunications, the ITU, has quite naturally tended to support this model.

The multistakeholder option – of which ICANN is one of the few examples at the global level – privileges a governance model which incorporates the interested parties in the whole decision making and implementation process. There are a few 'hybrid' multistakeholder entities which share characteristics of both models. The Red Cross, Red Crescent organisation is sometimes cited as an example.

Multilateral, inter-governmental models fail in the context of the Internet because the technology and infrastructure are global and consequently the policy issues are essentially global as well. Furthermore, there is evidence that inter-governmental mechanisms would be too slow and

---

21 .   European Parliament Committee on Civil Liberties, Justice and Home affairs (LIBE),
             2013/2188(INI), 8 January 2014.
22 .   European External Action Service (EEAS), the EU's counterpart to the US State Department.
23.   The European Parliament has meanwhile adopted a report on the surveillance issue, but the subject is beyond the scope of this paper at this time.

unresponsive to accommodate the fast moving Internet economy (although ICANN itself has not been particularly fast-moving.)

The EU has not supported multi-lateral solutions for the Internet because:

(a) the EU has accepted that global interoperability is a greater good than the opportunity to exercise EU or national control, and

(b) the EU itself is uncomfortable with its own position in the global intergovernmental context; whence – with the notable exception of the WTO – the chronic problems of competence and representation that the EU (and particularly the Commission) experience in international fora.

The **Multistakeholder model** has prevailed in the Internet, partly for historical reasons and partly in the light of the relative success of ICANN, to date, in carrying out its core responsibilities for managing the stability of the Internet. However, the multistakeholder model is under some stress:

– certain governments (RU, CN, some of the Arab states ...) have not accepted that stakeholders including civil society may associate 'on a par' with governments and/or stand in for them in representing the public interest. These tend to be the same governments who would prefer to deal with the Internet in the ITU.

The 'mantra' of 'transparency/accountability/participation' is not fully respected in practice. If we take ICANN as the leading example, transparency requires an enormous amount of on-line work, accountability is not yet fully achieved (otherwise why would one have this sequence of ATRT procedures), and participation is singularly unbalanced.

To take the last point a bit further, it has become clear that the checks and balances within ICANN among the various stakeholder groups are insufficiently articulated. The policy making processes (PDP) appears to be dominated by the GNSO. The ICANN staff, diligent as they may be, hardly comprise an effective counterweight. Within the GNSO, the Registrar community would appear to predominate, apparently because the larger Registrars are surprisingly profitable and consequently can afford sustained, large scale participation.

At the same time, the countervailing influence, on behalf of the public interest, of governments, NGOs, Civil Society and the At Large community is – in practice – too weak. There are several factors underlying this problem in the ICANN multistakeholder system, some of which are of quite long standing:

– GAC advice frequently arrives after the rest of the ICANN community considers that they have completed their PDP and sometimes when the ICANN Board is otherwise poised to take decisions. In general, intergovernmental processes, even the relatively informal processes of the GAC, are not at all adapted to participate in bottom-up policy development. In particular, the very limited resources that many governments can commit to ICANN-related work and – sometimes - the difficult negotiations among government delegates themselves, mean that issues cannot be resolved until a formal GAC meeting actually takes place during an ICANN session.

That is typically too late to influence final decisions, without generating scepticism and resentment among the other participants. A more proactive GAC approach to the PDP process tends to fall on the problem of limited resources and uncertain mandate of the eventual individual civil service participants (24).

GAC is currently engaging in an exercise with a view to improving its working methods. Not for the first time. Such a review might also consider the role of the GAC Secretariat. A qualified and stable Secretariat is necessary, independent of any one GAC member and of the ICANN staff. The Secretariat serves the GAC Chair and members in the detailed preparation of meetings and conference calls. It should also follow carefully the whole of the ICANN policy development process providing all member governments with a regular 'heads-up' as to prospective issues and forthcoming discussions in the ICANN organisation and meetings.

– The NGO and the Civil Society communities in ICANN are effectively divided between the NCSG and the ALAC. The Non Commercial Stakeholders (including academics) are part of the GNSO albeit normally in a minority. The At Large group – deriving historically from the original concept of individuals' membership of ICANN - operates in a parallel fashion through an At Large Advisory Committee, elected by the At Large Structures (typically national NGOs or ISOC Chapters).

Although there is considerable overlap between the two groups, these divisions do not contribute to their overall effectiveness. Also, the At Large have their own problems with their internal democratic decision making procedures, with the result that sometimes they also intervene too late in the PDP process to have the necessary effect.

The NCUC and ALAC positions do not always concur between them, nor do they necessarily reflect what GAC might have said or will have to say later in the process.

More generally, the multistakeholder model to date suffers from insufficient representativity and accountability. Although the process is indeed 'open' to all participants, subject to cost, time and the inconvenience of multiple international meetings, mailing lists, conference calls at all hours etc., in practice the process is driven by a handful of committed individuals, mostly from North America and Europe (25).

Thus while ICANN has generally put up with a high degree of self-selection and continuity among the leading participants among all the stakeholders, seen from the outside, and particularly from the point of view of the more critical governments, the level of representativity and accountability within the stakeholder groups leaves something to be desired. Particularly as they tend to claim that government delegates are much more legitimate, through elections and the mandating of civil servants. The Commission Communication states that "... public authorities ... public policy responsibilities ... includes the right to intervene with regulation where required." (p.7)

---

24 .   For instance, are public officials in a multistakeholder meeting representing themselves, their home government, or the GAC as a whole? Or are they just observers?

25 .   See in this connection the ATRT2 GNSO PDP Evaluation Study by Interconnect Communications, annexed to the final ATRT2 report, December 2013.

Against which it is argued by some civil society participants that governments are not monolithic and should not have the right to give any one individual (e.g. a GAC delegate) authority to speak for the government as a whole. On the contrary, different agencies in different fora and at different times, and are said to pursue their own agendas, with equal if not less legitimacy compared with civil society participants.

Public Interest representation within the ICANN system and the Nominating Committee

Establishing a credible and workable balance between the interests of the DNS operators, the technical system and users' interests within the ICANN Board has never been straightforward.

Originally, and following demands formulated within the IFWP (26) community, the US White House accepted that five Board members would be directly elected by individual users (one seat per major global region). In the event, two of the elected members (US and EU/DE) proved to be sufficiently radical in their ideas and working methods, that in 2002, ICANN, then under the auspices of the second CEO, Stuart Lynn, abandoned the concept of directly elected Board members altogether, to be replaced by a Nominating Committee which would appoint eight members of the Board. The Nominating Committee began its work in 2002. The voting members of the Board being appointed, by the Supporting Organisations (i.e. ASO, GNSO, ccNSO). (27) GAC, among other interested parties would have a non-voting seat on NomCom. Currently the GAC seat is held vacant.

In this context, the ICANN community as a whole is charged with creating and maintaining a geographical and gender balance among the Board members. However, in practice it has fallen to the Nominating Committee to attempt to correct those biases emerging from the Supporting Organisations' appointments.

Initially, the Nominating Committee endeavoured to create and maintain a balance within the Board by a policy of not appointing 'clones', that is candidates who could equally well have applied and been appointed by their natural constituencies, whether business, technical or ccTLD. However, in recent years the 'alternative route' has apparently become acceptable. The result is that while several admirable individuals have been appointed to the Board, the objective of the NomCom which should have been to ensure a countervailing balance, on behalf of the users' interests,within the ICANN Board has been diluted. For example, the ICANN business constituency is part of the GNSO, and it is by that route that one would have expected business representatives to be nominated to the Board, not via the Nominating Committee. Idem for the technical community.

Thus the scope and role of the Nominating Committee in appointing the ICANN Board would merit a review. The NomCom has not delivered a balanced ICANN Board, and could not, given the role of the Supporting Organisations. One option might be for the NomCom to appoint all the Board, on the clear understanding that the Board is primarily there to serve the public interest and that it

---

26 .   The International Forum for the White Paper (IFWP), a multistakeholder platform which debated the implementation of the US White Paper in several global meetings (Boston, Geneva ...).

27 .   The ICANN Board also comprises non-voting Liaisons with advisory committees (e.g. GAC) and – more recently - one voting member appointed by ALAC.

reflects in its composition a balanced expression of the stakeholders present, including the general public of Internet users, world-wide.

Were the consequences of the present situation benign, then no doubt one would overlook the causes. But they are not. Several aspects of the new gTLD programme illustrate the lack of balance and consideration of the public interest in the ICANN decision making process, and in Board decisions in particular. Critically, if the bottom up multistakeholder organisation is to respect the public interest, then the civil society participants and other user interests have to anticipate and articulate the public interest throughout the decision making process. In the ICANN context this means that the At Large community – and perhaps the Non-Commercial Stakeholder Group as well – will have to play a much more active role. Otherwise, a chronic *mesentente* between ICANN and the GAC will no doubt persist.

This is particularly important at this time because the multistakeholder model is under threat both from its own internal inconsistencies and from those governments which are increasingly persuaded as to the merits of alternative, multilateral, intergovernmental solutions.

Thus, the internal governance of ICANN appears to be a microcosm of the broader international debate regarding Internet Governance. Unless the multistakeholder option can be effectively protected against capture by commercial interests, then the case for a more inter-governmental solution will become progressively stronger. The bottom-up multistakeholder method will survive only if it is demonstrably able to deliver policies and decisions in the public interest.

———————————————

Annex 1: Commission Internet Governance principles

Annex 2: Links and references

Annex 3: Abbreviations and acronyms

Annex 1

DG CONNECT (European Commission) non-paper

Ten bullets in view of the April São Paulo meeting to create a global, inclusive, open and legitimate internet governance system

1. Strengthen of the multi-stakeholder model of Internet governance to make actors and processes more inclusive, transparent and accountable so all interests and classes of actors can play their respective roles on an equal footing;

2. Review existing Internet principles and work towards a coherent set of Internet principles agreed to by all governments and stakeholders, including the European Commission COMPACT principles;

3. Progress towards truly globally shared IANA functions by establishing alternatives to the current model and establishing a timeline for implementation;

4. Guarantee legitimacy and trust of the governance model through enhanced inclusiveness. Efforts must be made to engage all countries, and to draw onto a robust and sustainable middle ground those who want the multistakeholder model to work for all, in order to bridge differences and to avoid fragmentation of the internet. This should be done in particular through capacity building through new tools like the EC`s GIPO initiative;

5. Fully implement the recommendations of the UN Working Group on Improvements to the Internet Governance Forum to turn the IGF from a one-off event to a continuous process, involving national and regional IGFs, and including options to facilitate access to the IGF by developing nations;

6. Work towards a clear definition of the roles of public authorities and stakeholders in Internet Governance. Careful overall balance should be achieved in GAC, the chair should be professional and independent and a fully independent Secretariat should become operational;

7. Develop processes and tools that facilitate issues-based multistakeholder dialogue and decision-making across organisational boundaries;

8. Identify ways in which protocol and standard setting processes in the technical community can more effectively include public policy considerations and civil society participation;

9. Develop a common understanding of appropriate forms of self- and co-regulation on the Internet across the world;

10. Create and strengthen mechanisms for better multi-stakeholder and trans-national cooperation and dialogue among the public and private sector and civil society on Internet-related matters.

Annex 2 – Relevant Links and References.

The Montevideo Statement:

http://www.icann.org/en/news/announcements/announcement-07oct13-en.htm

Huffington post on-line article:

http://www.iab.org/documents/correspondence-reports-documents/2013-2/montevideo-statement-on-the-future-of-internet-cooperation/

http://www.1net.org/content/en

http://www.huffingtonpost.com/jeanchristophe-nothias/sacrificing-the-icann-wil_b_4259217.html

http://www.snis.ch/node/8146

https://community.icann.org/display/gseeuropewkspc/ICANN+Engagement+Strategy+for+Europe

https://community.icann.org/display/gseeuropewkspc/ICANN+Engagement+Strategy+for+Europehttps://community.icann.org/display/gseeuropewkspc/ICANN+Engagement+Strategy+for+Europehttps://www.cs.auckland.ac.nz/~brian/CrossBorderInfoGovernance.pdf

Internet Governance Project, Syracuse University, NY.
Proposal for the reform of IANA.

www.internetgovernance.org/wordpress/wp-content/uploads/ICANNreformglobalizingIANAfinal.pdf

Domain Name System Security:

http://www.theguardian.com/technology/2014/feb/28/seven-people-keys-worldwide-internet-security-web

Swedish Minister's Speech:

https://ftth.solidtango.com/video/ftth-20vic-2002-20anna-karin-20hatt

Annex 3 A list of abbreviations and acronyms used in this paper, in the order in which they appear.

ICANN: I   nternet Corportion for Assigned Names and Numbers

DNS: Domain Name System

US NTIA/DoC: National Telecommunications and Information Agency (NTIA)
Part of the US Department of Commerce (DoC)

ITU: International Telecommunications Union.
An UN agency, based in Geneva, Switzerland.

COM(2014)72 final: Standardised identifier for any European Commission Communication.

WCIT: World Conference on International Telecommunications; an ITU conference

gTLD: Generic Top Level Domain (such as .com, .net etc.)

ccTLD: Country Code Top Level Domain (such as .eu, .be, .us etc.)

GNSO: Generic Names Supporting Organisation. Part of ICANN, compirisng Registry, Registrar, Business and Non Commercial constitutencies.

NCUC: Non Commercial Users Constituency.

At Large: ICANN community representing the interests of individual users:

ALAC: At Large Advisory Committee. Appointed by At Large community.

GAC: ICANN Governemntal Advisory Committee.

PDP: ICANN Policy Development Process.

IG: Abbreviation used to refer to Internet Governance.