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Submitted by

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Jurisdiction of ICANN

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Statement issued by 8 Indian civil society organisations, supported by two key global networks, involved with Internet governance issues, to the meeting of ICANN in Hyderabad, India, from 3rd to 9th November, 2016

Internet's core resources are a global public good – They cannot remain subject to one country's jurisdiction

Recently, the US gave up its role of signing entries to the Internet's root zone file, which represents the addressing system for the global Internet. This is about the Internet addresses that end with .com, .net, and so on, and the numbers associated with each of them that help us navigate the Internet. We thank and congratulate the US government for taking this important step in the right direction. However, the organisation that manages this system, ICANN[1], a US non-profit, continues to be under US jurisdiction, and hence subject to its courts, legislature and executive agencies. Keeping such an important global public infrastructure under US jurisdiction is expected to become a very problematic means of extending US laws and policies across the world.

We the undersigned therefore appeal that urgent steps be taken to transit ICANN from its current US jurisdiction. Only then can ICANN become a truly global organisation[2]. We would like to make it clear that our objection is not directed particularly against the US; we are simply against an important global public infrastructure being subject to a single country's jurisdiction.

Domain name system as a key lever of global control

A few new top level domains like .xxx and .africa are already under litigation in the US, whereby there is every chance that its law could interfere with ICANN's (global) policy decisions. Businesses in different parts of the world seeking top level domain names like .Amazon, and, hypothetically, .Ghaniancompany, will have to be mindful of *de facto* extension of US jurisdiction over them. US agencies can nullify the allocation of such top level domain names, causing damage to a business similar to that of losing a trade name, plus losing all the 'connections', including email based ones, linked to that domain name. For instance, consider the risks that an Indian generic drugs company, say with a top level domain, .genericdrugs, will remain exposed to.

Sector specific top level domain names like .insurance, health, .transport, and so on, are emerging, with clear rules for inclusion-exclusion. These can become *de facto* global regulatory rules for that sector. .Pharmacy has been allocated to a US pharmaceutical group which decides who gets domain names under it. Public advocacy groups have protested[3] that these rules will be employed to impose drugs-related US intellectual property standards globally. Similar problematic possibilities can be imagined in other sectors; ICANN could set “safety standards”, as per US law, for obtaining .car.

Country domain names like .br and .ph remain subject to US jurisdiction. Iran's .ir was recently sought to be seized by some US private parties because of alleged Iranian support to terrorism. Although the plea was turned down, another court in another case may decide otherwise. With the 'Internet of Things', almost everything, including critical infrastructure, in every country will be on the network. Other countries cannot feel comfortable to have at the core of the Internet’s addressing system an organisation that can be dictated by one government.

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1 *Internet Corporation for Assigned Names and Numbers*

2 The “NetMundial Multistakeholder Statement” , endorsed by a large number of governments and other stakeholders, including ICANN and US government, called for ICANN to become a “truly international and global organization”.

3 See, https://www.techdirt.com/articles/20130515/00145123090/big-pharma-firms-seeking-pharmacy-domain-to-crowd-out-legitimate-foreign-pharmacies.shtml

ICANN must become a truly global body

Eleven years ago, in 2005, the Civil Society Internet Governance Caucus at the World Summit on the Information Society demanded that ICANN should "negotiate an appropriate host country agreement to replace its California Incorporation".

A process is currently under-way within ICANN to consider the jurisdiction issue. It is important that this process provides recommendations that will enable ICANN to become a truly global body, for appropriate governance of very important global public goods.

Below are some options, and there could be others, that are available for ICANN to transit from US jurisdiction.

1. ICANN can get incorporated under international law. Any such agreement should make ICANN an international (not intergovernmental) body, fully preserving current ICANN functions and processes. This does not mean instituting intergovernmental oversight over ICANN.

2. ICANN can move core internet operators among multiple jurisdictions, i.e. ICANN (policy body for Internet identifiers), PTI[4] (the operational body) and the Root Zone Maintainer must be spread across multiple jurisdictions. With three different jurisdictions over these complementary functions, the possibility of any single one being fruitfully able to interfere in ICANN's global governance role will be minimized.

3. ICANN can institute a fundamental bylaw that its global governance processes will brook no interference from US jurisdiction. If any such interference is encountered, parameters of which can be clearly pre-defined, a process of shifting of ICANN to another jurisdiction will automatically set in. A full set-up – with registered HQ, root file maintenance system, etc – will be kept ready as a redundancy in another jurisdiction for this purpose.[5] Chances are overwhelming that given the existence of this bylaw, and a fully workable exit option being kept ready at hand, no US state agency, including its courts, will consider it meaningful to try and enforce its writ. This arrangement could therefore act in perpetuity as a guarantee against jurisdictional interference without actually having ICANN to move out of the US.

4. The US government can give ICANN jurisdictional immunity under the United States International Organisations Immunities Act . There is precedent of US giving such immunity to non-profit organisations like ICANN.[6] Such immunity must be designed in such a way that still ensures ICANN's accountability to the global community, protecting the community's enforcement power and mechanisms. Such immunity extends only to application of public law of the US on ICANN decisions and not private law as chosen by any contracting parties. US registries/registrars, with the assent of ICANN, can choose the jurisdiction of any state of the US for adjudicating their contracts with ICANN. Similarly, registries/registrars from other

4 Public Technical Identifier, a newly incorporated body to carry out the operational aspects of managing Internet's identifiers.

5 This can be at one of the existing non US global offices of ICANN, or the location of one of the 3 non-US root servers. Section 24.1 of ICANN Bylaws say, "The principal office for the transaction of the business of shall be in the County of Los Angeles, State of California, United States of America. may also have an additional office or offices within or outside the United States of America as it may from time to time establish".

6 E.g., International Fertilizer and Development Center was designated as a public, nonprofit, international organisation by US Presidential Decree, granting it immunities under United States International Organisations Immunities Act . See https://archive.icann.org/en/psc/corell-24aug06.html .

countries should be able to choose their respective jurisdictions for such contracts.

We do acknowledge that, over the years, there has been an appreciable progress in internationalising participation in ICANN's processes, including participation from governments in the Governmental Advisory Committee. However, positive as this is, it does not address the problem of a single country having overall jurisdiction over its decisions.

Issued by the following India based organisation:

Centre for Internet and Society, Bangalore
IT for Change, Bangalore
Free Software Movement of India, Hyderabad
Society for Knowledge Commons, New Delhi
Digital Empowerment Foundation, New Delhi
Delhi Science Forum, New Delhi
Software Freedom Law Center, India, New Delhi
Third World Network - India, New Delhi

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Association For Progressive Communications
Just Net Coalition

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