Response to the Questionnaire of CSTD's Working Group on Enhanced Cooperation

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Dated:15th December, 2016

(1) What are the high level characteristics of enhanced cooperation?

Enhanced Cooperation is clearly defined by para 69 of Tunis Agenda:

> We further recognize the need for enhanced cooperation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues.

This definition of enhanced cooperation amply clarifies what it is supposed to mean, and what its high level characteristics are.

1. It is about "public policies" pertaining to the Internet: Tunis Agenda (para 34) takes a broad view of Internet governance including in its remit many kinds and levels of "principles, norms, rules, decision-making procedures, and programmes" related to shaping of the Internet. Of this broad area of Internet governance, enhanced cooperation relates only and specifically to "public policies". What are "public policies" is generally well-understood, and there is not much scope for confusion in this regard. Public policies are widely seen as directions for action laid out for an entire social-political unit by its legitimate political authorities, which may have the backing of coercive force of the state, or a combination of them (as at the international level).

2. Enhanced cooperation relates to "international" public policies, and not national ones: In an increasingly interconnected world, the world community agrees to some common international policies, and this area alone is what "enhanced cooperation" concerns itself with. We know of such policies as ranging from the human rights instruments to the global trade agreements. Some such policies exist in virtually every area/ sector, from health, education and agriculture to communication, trade and warfare. It is difficult to imagine our globalised world without such commonly agreed international public policies. More we get globalised – and Internet is a strong force towards that – more such international public policies are needed.

3. Technical and operational activities are excluded: Tunis Agenda specifically excludes Internet-related "day-to-day technical and operational matters, that do not

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impact on international public policy issues" from the rubric of enhanced cooperation. Therefore, the activities of ICANN and its associated technical organisations are not included here. Such exclusion, however, is only as far as they "do not impact on international public policy issues". Tunis Agenda is clear that enhanced cooperation does include 'the development of globally-applicable principles on public policy issues associated with the coordination and management of critical Internet resource'. This clear separation of role of public policy from "day-to-day technical and operational matters" is very significant.

4. It is about "governments' role" in public policy making: Enhanced cooperation is specifically about government's role in international public policies. Other stakeholders too have important roles in public policy development, but, as is well known, "public policies" are definitionally made by governments. (Governments, definitionally, being agencies who make and enforce public policies.) Para 35 of Tunis Agenda reaffirms this fact. There may be other organisations that are focussed on role of other stakeholders in policy making, Internet Governance Forum being one such important body. But the call for enhanced cooperation is *specifically* about means or mechanism for enabling the central role of governments in making Internet-related international public policies.

5. All governments must be on an equal footing: All governments should be able to fulfil their role with respect to Internet-related international public policies "on an equal footing". As will be discussed later, there are many instances of Internet-related public policies that have a global impact but in their development all governments do not have an "equal footing" role. This goes against the idea and requirement of "enhanced cooperation".

We commend the current exercise of beginning with a focus on what are the high level fundamental characteristics of "enhanced cooperation" as defined by the Tunis Agenda. A discussion on how to operationalize "enhanced cooperation", as is the mandate of the Working Group on Enhanced Cooperation, cannot take place in any fruitful manner without first developing a basic agreement at this level.

We have seen previous discussions on the subject often meander into areas which have nothing to do with "enhanced cooperation" as defined by the Tunis Agenda. This should be avoided at all cost, in order to move forward on the mandate of the Working Group on Enhanced Cooperation (WGEC).

Recommendations of the working group on means for enhanced cooperation must be tested against and conform to all these five fundamental high level characteristics of enhanced cooperation.

(2) Taking into consideration the work of the previous WGEC and the Tunis Agenda, particularly paragraphs 69-71, what kind of recommendations should we consider?

This version of WGEC must build upon the work done by the previous WGEC, especially as encapsulated in the documents listing the public policy and corresponding institutional gaps. These gaps have only been further accentuated in the past years, and more gaps are appearing at a very rapid pace. *We are*

concerned at the view expressed by some WGEC members that the important work done in this regard, as put together by the relevant secretariat document on public policy and institutional gaps, be abandoned. Very ironically, most of these actors were the ones who, at the start of the previous WGEC, had insisted on doing a public policy mapping first before proceeding to institutional recommendations.

The WGEC is mandated to provide recommendations on means of enhanced cooperation as defined in paras 69 to 71 of Tuns Agenda. In the light of the above described high level characteristics of enhanced cooperation, such *recommendations should aim at providing means or mechanisms for governments to be able to fruitfully fulfil their role and responsibility, on an equal footing, with regard to Internet-related international public policies.*

As for what kind of means or mechanisms will be appropriate to be recommended in this regard, the WGEC will need to inquire into three sequential questions. These are;

(a) Are there enough important international public policy issues pertaining to the Internet?

(b) If the response to (a) is yes, then are governments able to appropriately fulfil their roles and responsibilities, *on an equal footing*, with regard to these international public policy issues?

(c) If the response to (b) is in the negative, then what means or mechanisms will be appropriate and adequate for enabling governments to fulfil their required role, on an equal footing, especially looking at the nature and importance the existing and emergent Internet-related international public policies.

Let us briefly consider these questions in turn.

Are there enough important international public policy issues pertaining to the Internet?

Internet, and its associated digital technologies, constitute a paradigmatic social force and are fundamentally transforming practically every sector, from media and communication, to education, health and education, to business, transportation and tourism, to governance and warfare. The succession of powerful avatars or aspects of this paradigm – dotcoms, search engines, social media, Internet platforms, big data, algorithmic decision-making, Internet of Things, and now artificial intelligence – seems unending, and their impact has been far-reaching. Indeed, we have hardly seen it all yet. Even a cursory look at the newspapers, much less going through contemporary social analysis, provides a good picture of the extent, potency and importance of the social changes that the Internet is causing. In the circumstances, it is but obvious that there are numerous immensely important public policy issues that arise around these phenomena.

Lets choose at random just one issue to judge the importance and urgency of public policy action in this area. Right now, as we write this in the last week of November, 2016, post US election results, newspapers are agog with the problem of fake news on the Internet and the possibilities of elections in one country being able to be manipulated from another, through various digital means. Today, as this note is being

drafted, the news is that German Chancellor Angela Merkel, to quote the heading, "fears social bots may manipulate German election". The same news item[3] says that "Merkel has raised the idea of a code of conduct for social networks". Everyone seems to want to have something done about such monumental problems, and if public policy does not have a role here, one cant see what might have. We have deliberately chosen just one issue that is hot right now, in these weeks. The importance and urgency of this randomly picked issue shows how significant this overall field of Internet-related public policy is, and how crucial are the needed international public policy responses. This example of one issue being so important and urgent right now, in the narrow current window of time, shows both the vastness of the field of issues and their rapidly evolving nature.

The month before, it was artificial intelligence being discussed everywhere. An area that seems to have entered the general public vision just earlier this year is already seeing strong consumer-focussed applications around us; it is being employed in search engines, and the next version of top smart phones will carry artificially intelligent personal assistants (some already do). With artificial intelligence, even the coder cannot explain the basis of outcomes that the software provides, raising many ethical and practical questions of great social and political bearing. Over 2016, we also witnessed many social commentaries and regulatory battles around Uberification of work, and AirBnB-ification of distributed private resources. While the phenomenon, and the strong actors behind it, are global, the regulatory bodies are city- or nation-based, finding themselves not equipped at all for the new situations. The manner in which global digital corporations are very easily able to move their legal offices, finances, and their key assets – software and data – across the globe, because of their peculiar nature of business, leaves most nationally-bound policy regimes frustrated.

It is therefore also equally evident that, perhaps like no other phenomenon before (other than climate change), Internet related issues are of a global nature. Internet was deliberately designed in a trans-national manner, and its key elements continue to carry this characteristic. It is therefore undeniable that the public policies associated with the Internet, existing or the required ones, have a strong international aspect or dimension. Ask any nation, especially from the South, how much policy control it feels it has over the globalised digital phenomenon, even as it deeply affects and is transforming all sectors of its society! This situation is simply not sustainable. We urgently require a global response to it, and it is the high duty of this working group to come up with the required response.

One has, for instance, to just look at the very full agenda of the OECD's Committee on Digital Economy Policies, which is continually taking up newer and newer issues for consideration, to judge the nature, extent and importance of Internet-related international public policy issues.

The above clearly shows that there exist numerous very important international public policy issues pertaining to the Internet, and new ones keep emerging as we sit on the cusp of an epochal social transformation ushering in a post-industrial digital society.

This leads us to consider the second question: are governments able to appropriately fulfil their roles and responsibilities, on an equal footing, with

3   http://in.reuters.com/article/germany-merkel-socialbots-idINKBN13J1WR, November 24, 2016

regard to these international public policy issues?

We have already indicated that most nations remain utterly confused and feel helpless in this regard. Mostly, there is not much that can be done at the national level, and no proper forum exists at the international level for Internet-related international public policy issues.

With regard to such a powerful social phenomenon as the Internet and its associated digital technologies, which are transforming all sectors, and whose nature is fundamentally global, it is an obvious anomaly, of epic proportions, that there exists no international public policy forum for Internet related policies. The danger it poses, and in fact the damage it is already doing, to global public interest should be self-evident.

Absence of a democratic ("equal footing") global public policy forum does not mean that Internet/digital polices that are applicable globally are not being made. As they say, 'politics abhor a vacuum'. It is important to understand what or who is driving these default global policy regimes. OECD's mentioned Committee on Digital Economy Policies has been developing many such policy frameworks. A few years ago, it developed "Principles for Internet Policy Making", about which there has been stated intent to make them applicable globally. In the circumstance, it is extremely ironical that, at globally democratic forums, like the WGEC itself, it is the OECD countries that are most active to assert that there are no important Internet-related international public policy issues that need addressing. They presumably mean that that they themselves are doing a good enough job for the whole world!

Meanwhile, with most key global digital corporations being US based, US policy regimes in any case apply to them (as they also apply to the ICANN). Through the global operation of these corporations, these US's public policy priorities then get applied over the whole world. EU recently held a consultation on public policy issues pertaining to Internet platforms. EU has also been active to prevent digital corporations from avoiding taxes in the countries where they actually sell their services. Trans-border flows of data – that most vital of digital asset, as well as the bearer of key rights – is a constant pre-occupation of EU authorities. Strangely, however, these do not seem to them as important international Internet-related public policy issues when participating in globally democratic forums like UN bodies, including the WGEC.

From the work of OECD's Committee on Digital Economy Policies, and other pluri-lateral activities of the developed countries, it seems evident that they would prefer to develop "globally applicable" policy frameworks for the extremely important and powerful digital phenomenon, especially in this crucial formative stage, all by themselves, excluding the developing countries. These efforts clearly do not meet the "equal footing" criterion of the definition of enhanced cooperation.

Apart from rich countries dominated plurilateral bodies dealing with these important international public policy issues, the digital arena is also fast getting subject to private governance, dominated by global corporations. Lets again take the currently hot example of artificial intelligence. An October, 2016, news-story[4] reports that a UK

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4   https://techcrunch.com/2016/10/12/ai-accountability-needs-action-now-say-uk-mps/

parliamentary committee has urged the government to act pro-actively — and to act now — to tackle "a host of social, ethical and legal questions" arising from growing usage of autonomous technologies such as artificial intelligence. Another US government report[5] of the same month asserts: "As the technology of AI continues to develop, practitioners must ensure that AI -enabled systems are governable; that they are open, transparent, and understandable; that they can work effectively with people; and that their operation will remain consistent with human values and aspirations." Artificial Intelligence is obviously an immensely important new phenomenon, of global dimensions and importance, with extra-ordinary social policy significance. But in the absence of any democratic international platform for taking up Internet/ digital governance issues, the world is perhaps left to look up to a recently formed private sector platform called the "Partnership on AI – To Benefit People and Society" floated by the top six digital corporations. Its declared aim is 'to study and formulate best practices on AI technologies, to advance the public's understanding of AI, and to serve as an open platform for discussion and engagement about AI and its influences on people and society'. Aren't these appropriately an international public policy function to be addressed by democratic political mechanisms? Again, this is just one example, of a currently much discussed issue. (We can discuss dozens, if not more, of other similarly important Internet-related public policy issues but the space and context does not allow us to do that.)

The real meaning and purpose of enhanced cooperation therefore is to provide a democratic mechanism (meaning all "governments" are on an "equal footing") for development of the very much needed international Internet-related public policies. Such a mechanism is urgently needed if global public interest is to be safeguarded with respect to this most powerful social force, the Internet and its associated digital technologies, and the vast and deep social impact they are causing everywhere.

Every day that is being lost in not putting up the required institutional response, which is participative and democratic, means great damage to public interest. Because, in default, powerful actors keep shaping the new social paradigm in their interests. As the new structural designs become entrenched, it will become very difficult, at any latter time, to reverse their defects and harmful features, as too much economic, social and political capital would have got invested in them. This underlines a great urgency to this matter.

This brings us to the third, and the key, question; what means or mechanisms will be appropriate and adequate to enabling governments to fulfil their required role, on an equal footing, especially looking at the nature and importance the existing and emergent Internet-related international public policies, and therefore should constitute the recommendations of this working group.

The mandate of this working group is to provide recommendations to implement enhanced cooperation as envisaged in Tunis Agenda, paras 69 to 71. In light of the above analysis, its recommendations must be in form of suggesting a mechanism(s) that can enable all governments, on an equal footing, to develop the much needed

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5   https://www.whitehouse.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf

international public policies pertaining to the Internet, and its associated digital phenomenon.

For a phenomenon that is so powerful as well as pervasive, and which is strongly global, such an institutional mechanism can be only in form of a UN body dedicated to this subject. This would be similar to how there is WHO for health, UNESCO for education, FAO for food and agriculture, UNICEF for child issues, UNDP for development, UN Women for gender, and so on.

It can even be argued that the important issues addressed by the mentioned UN agencies are by themselves much less global, and more local, that the digital phenomenon. The needs for an independent global agency for Internet/ digital issues is therefore particularly important. Further, to claim that creating a UN body on Internet/ digital issues means UN control over the Internet – whatever it means – is as far-fetched as to argue that because of existence of these various UN agencies the UN has taken control of education, health, food/ agriculture, child, development, and gender policies at national levels. These UN agencies provide research and analysis for policy support to member countries, build normative frameworks both for national and international activities of countries, and, as and when required, helps develop soft or hard international law, including in form of required treaties, which requires consensus among all members. An UN body for Internet/ digital issues would also only do as much.

OECD's Committee on Digital Economy Policies provides a good model for a UN body for Internet/ digital issues. In this OECD Committee, decisions are taken in an inter-governmental manner, but with extensive inputs from and discussions with all stakeholders. Proposing a similar model at the UN level should, at least *prima facie,* make it harder for OECD countries to oppose it, since they themselves develop digital policies in this manner.

In 2011, [India had proposed a UN Committee On Internet-related Policies](), which seems to be very similar in design to OECD's Committee on Digital Economy Policies. However, there was a lot of opposition to one proposed function of this committee, which was to coordinate and oversee Internet's technical bodies (read, ICANN et al). This function was read by many to contradict the requirement in Tunis Agenda for any means or mechanism of enhanced cooperation to stay out of day-to-day technical and operational issues. This proposal for a new UN agency can stand even if this one function is deleted (which in our view should be deleted). However, this committee will still have the task laid in the Tunis Agenda of 'the development of globally-applicable principles on public policy issues associated with the coordination and management of critical Internet resource'.

It must be mentioned here that, such is the vastness and importance of Internet-related policy issues, and their fast changing nature, that an important function of this new mechanism or body will have to be of undertaking extensive research and providing support[6], especially to the developing countries, on Internet related public policy issues. The kind of extensive work that is needed in this regard at the global level really requires a full-fledged UN body for Internet/ digital technologies, and not just a UN committee, however well-resourced, as sought by the mentioned Indian

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6   As UNCTAD provides research and other inputs for developing countries on the issue of international trade.

proposal.

(ICANN earns a lot from what constitutes a global tax on domain name holders, a part of which can be employed to support this new agency.)

The importance and urgency for such a new UN based institutional mechanism can be judged by a simple consideration: *If a developing country today finds difficulties with how data is being handled by global digital corporations in that country, and wants policy guidance, better policy harmonisation with other countries, especially with where the concerned company may be based, or real enforcement action to ensure the rights of its people, which global forum can it turn to today? Similar things can be said about Internet platforms, Internet of Things, social media, cross-border artificial intelligence applications, and so on.* (We have deliberately excluded technical issues, focussing only on economic and social policy issues, since for the former there is ICANN and ITU, but there is none for the latter, which may increasingly be even the more important set of issues.)

If this does not constitute a severe global governance deficit, it is difficult to imagine what will. Especially so in this age, when digital phenomenon is transforming practically every sector, and public policies are simply not able to keep up. If all countries get together, in the global public interest, there may just be a chance!

It is therefore most important for the WGEC to recommend a clear mechanism for governments to be able to develop international public polices pertaining to the Internet, in consultation with all stakeholders. We are unable to see what such mechanism can be, in any effective form, other than a new UN agency dedicated to Internet/ digital issues.

An appropriate international legal framework will be required sooner rather than later for the overall global Internet governance eco-system. Accordingly, one of the early tasks of the proposed "new body" dealing with Internet-related public policy issues, discussed above, will be to help negotiate a "Framework Convention on the Internet" (somewhat similar to the Framework Convention on Climate Change). Governance of the Internet concerns a variety of issues that are ever evolving. It is, therefore, preferable to formulate an enabling legal structure as a "framework convention" rather than as a specific treaty or convention that addresses only a bounded set of issues.

In the penultimate part below, we briefly discuss three kinds of institutional mechanisms that are proposed by different actors for the task at hand, arguing why there are inappropriate and/or inadequate.

Some people advocate that the role proposed for the new UN Internet/ digital agency can simply be taken over by the ITU, which is already the UN body for telecommunication. It may be possible to sufficiently change the mandate, and equally importantly, the form, of the ITU for it to be up to this task, but we are sceptical. The ITU is organised for a technical mandate, and it should best stick to that. The key Internet/ digital issues we have discussed in this note are of social, economic, political and cultural kind, which require a very different approach than ITU can take. It also needs a more open, participative social policy development process (focussing on non-technical or policy actors) than exists in the ITU. There will continue

to be very important technical issues in the Internet/ digital area, which technical agencies like the ITU, ICANN etc should keep addressing. However, they are not appropriate for economic and social policy aspects of this new phenomenon, which is the focus of enhanced cooperation. The real governance deficit is with regard to such larger public policy issues, and not regarding technical policies. It is important to begin seeing the Internet/ digital sector as not just a technical field, but as an important and powerful social force and phenomenon.

Other actors propose that Internet Governance Forum (IGF) is already fulfilling the role of enhanced cooperation, and/ or it can be further shaped/ strengthened for such a role. The IGF mandate is to enable "other stakeholders" – the non governmental ones – to fulfil their very important, discursive and participatory, role in Internet-related public policy making. It does not provide an avenue for governments to fulfil their role of actually making Internet-related public policies. (Though it enables governments to fulfil their role of taking public inputs that are very essential part of policy development.) We must not conflate these very different roles, and the different structures needed for different roles. The IGF is by design an "equal footing" structure, to ensure free and open policy deliberations. Public policy making, however, can never be made with government and non government actors on an equal footing – a global digital corporation, for instance, certainly cannot have an equal role in policy making on par with governments.

Lastly, some actors claim that since the Internet is a horizontal or meta phenomenon encompassing almost all sectors, which have their dedicated policy mechanisms, including at the UN level, it is best that Internet-related policies are developed within the respective sectors. Such a stance denies the uniqueness and power of the Internet and the digital phenomenon as a social force in its own right. This phenomenon has its strong generic features even though its impacts is seen mostly in existing sectors, like media, transport, health and governance. Phenomena like social media, big data, Internet platforms, Internet of things, algorithmic decision making, and artificial intelligence, and the list is still unending, direct and underpin special kinds of social changes everywhere. They have also to be understood, assessed, and governed generically, beyond just seeing them from within different impacted sectors (which too is important). This is imperative for effective governance in the digital age.

Almost all countries have a separate ministry or department dealing with Internet/ digital issues. A similar structure is needed at the global level. Such an agency/ body however should work in close relationship with sectoral governance bodies, providing expertise and governance inputs/instruments for the generic features of the phenomenon, while keeping a close watch on its specific sectoral manifestations. In absence of a global Internet/ digital issues specialist agency, that looks at the sector from a holistic social, economic and cultural standpoint, some of the most important digital governance issues are by default being decided in trade treaties. For instance, as the US and the EU spar (in trade treaty negotiations like TISA and TTIP[7]) over whether data has basically to be seem through a trade lens or a rights lens, and whether the yet evolving, and some yet unknown, digital services, which will form the digital age, can peremptorily be declared to remain unregulated, there is no

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7   Respectively, Trade in Services Agreement and Trans-Atlantic Trade and Investment Partnership

democratic global agency specialising in this sector that can weigh in on this all-important Internet/ digital policy issue. This would be analogous to how the views and principles of WHO, UNESCO, ILO and UNEP respectively on health, education, labor and environment related issues provide the context within which the more narrowly immediate self-interest focussed trade treaties may deal with key issues of social policy.

The WGEC has the historic responsibility to recommend a global institutional framework that would adequately address the numerous extremely important public policy issues that arise as our societies undergo a digital transformation. This responsibility cannot be taken lightly. WGEC must rise to the occasion and do all that is needed to be done to protect the public interest in these key times of flux – which contains both immense opportunity but also crippling challenges. Abdication at this crucial time will lead to long-term, and potentially irreversible, damage to the prospects of a prosperous, equitable and just digital society.

To end, we will very briefly address an important issue which was at the centre of discussions in Tunis over issues that got framed in the "enhanced cooperation" rubric – the issue of oversight of and jurisdiction over ICANN.

In this regard we refer to two document:

(1) A statement issued by key civil society organisations, supported by two global networks of civil society organisations, on the issue of jurisdiction over ICANN. This is the annex 1 to this document.

(2) The submission made by Just Net Coalition to the NetMundial Conference regarding the "Roadmap for the further evolution of the Internet Governance eco-system" which is at http://content.netmundial.br/contribution/democratising-global-governance-of-the-internet/164 . Apart from dealing with the issue of oversight of ICANN plus, this submission ***also details other institutional recommendations made above.*** It forms the annex 2 to this document.

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[8], 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[9]. 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[10] 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.

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8   *Internet Corporation for Assigned Names and Numbers*

9   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".

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

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.

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.
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> 2. ICANN can move core internet operators among multiple jurisdictions, i.e. ICANN (policy body for Internet identifiers), PTI[11] (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.
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> 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.[12] 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.
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> 4. The US government can give ICANN jurisdictional immunity under the

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

12 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".

United States International Organisations Immunities Act . There is precedent of US giving such immunity to non-profit organisations like ICANN.[13] 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 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

Supported by the following global networks:
Association For Progressive Communications
Just Net Coalition

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13 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 .

Annex 2

Submission made by Just Net Coalition[14] to the Net Mundial Conference on the required institutional architecture for global Internet governance

23, 24 - April 2014 *São Paulo,* **Brazil**

Democratising Global Governance of the Internet

How to Achieve a Just and Equitable Internet for All

The Internet has become a vitally important social infrastructure that profoundly impacts our societies. We are all citizens of an Internet-mediated world whether as the minority who uses it or the majority who does not. *The Internet must advance human rights and social justice. Internet governance must be truly democratic.*

The Internet is reorganising public institutions, including those related to governance, welfare, health, and education, as well as key sectors such as media, communications, transport and finance. It has transformed the way we do many things but the benefits promised for all have not been adequately realized. On the contrary - we have seen mass surveillance, abusive use of personal data and their use as a means of social and political control; the monopolization, commodification and monetisation of information and knowledge; inequitable flows of finances between poor and rich countries; and erosion of cultural diversity. Many technical, and thus purportedly 'neutral', decisions have in reality led to social injustice as technology architectures, often developed to promote vested interests, increasingly determine social, economic, cultural and political relationships and processes.

Opportunities for the many to participate in the very real benefits of the Internet, and to fully realize its enormous potential, are being thwarted by growing control of the Internet by those with power - large corporations and certain national governments. They use their central positions of influence to consolidate power and to establish a new global regime of control and exploitation; under the guise of favouring liberalization, they are in reality reinforcing the dominance and profitability of major corporations at the expense of the public interest, and the overarching position of certain national interests at the expense of global interests and well being.

Existing governance arrangements for the global Internet are inadequate. They suffer from a lack of democracy; an absence of legitimacy, accountability and transparency; excessive corporate influence and regulatory capture; and too few opportunities for effective participation by people, especially from developing countries. The situation can be remedied only through fundamental changes to the current governance arrangements.

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The governance of the Internet must proceed from the position that inter-connectivity cannot serve human rights and social justice unless it leads to and supports distributed power, particularly to the grassroots but also across the various Internet divides—social, economic, political. Ensuring that the Internet does not in fact lead to greater centralisation of power will therefore require appropriate interventions at all levels of Internet governance. Building an effective framework to achieve these objectives is the greatest challenge today in terms of global governance of the Internet.

We have outlined elsewhere the principles that, in our view, must underpin the Internet in the future.

We offer here an outline of a framework for how to implement these principles in the future. This framework should underpin the emergence of an Internet that advances human rights and social justice globally, and the reconfiguration of Internet governance into a truly democratic space.

A roadmap for democratising global governance of the Internet

1. New global governance mechanisms are needed. We believe that two distinct mechanisms are needed: one that looks at the global Internet-related public policy issues in various social, economic, cultural and political domains, and another that undertakes oversight of the technical and operational functions related to the Internet (basically, replacing the current unilateral oversight of ICANN and IANA by the US government). This will require the setting up of appropriate new global governance bodies as well as a framework of international law to facilitate their work, as follows.

2. A new UN body for Internet-related public policy issues: An anchor global institution for taking up and addressing various public policy issues pertaining to the Internet in an ongoing manner is urgently required. It can be a committee attached to the UN General Assembly or a more elaborate and relatively autonomous body linked loosely to the UN (as a specialized UN body). It should have a very strong and institutionalized public consultative mechanism, in the form of stakeholder advisory groups that are selected through formal processes by different stakeholder constituencies, ensuring adequate representativeness. (OECD's Committee on Computer, Information and Communication Policy and India's recent proposal for a UN Committee on Internet-related Policies are two useful, and somewhat similar, models that can be explored.) This 'new body' will stay abreast of global Internet-related issues; where necessary, develop international level public policies in the concerned areas; seek appropriate harmonization of national level policies; and facilitate required treaties, conventions and agreements. It will also have the necessary means to undertake studies and present analyses in different policy areas.

Most Internet-related public policy issues are of a cross-cutting nature, and overlap with mandates of other existing global governance bodies, such as WIPO, UNESCO, WTO, UNDP, UNCTAD, ITU and so on. This proposed new 'body' would establish appropriate relationships with these other existing bodies, including directing relevant public policy issues to them, receiving their inputs and comments, and itself

contributing specific Internet-related perspectives to issues under the purview of these other bodies.

3. A new 'Internet Technical Oversight and Advisory Board': This Board will replace the US government's current oversight role over the technical and operational functions performed by ICANN. The membership of this oversight Board can be of a techno-political nature, *i.e.* consisting of people with specialized expertise but who also have appropriate political backing, ascertained through a democratic process. For instance, the Board can be made of 10/15 members, with 2/3 members each from five geographic regions (as understood in the UN system). These members can perhaps be selected through an appropriate process by the relevant technical standards bodies and/or country domain name bodies of all the countries of the respective region. They could perhaps come from top recognised technical academic bodies of each country/ region. One member each from each Regional Internet Registries could also be included. (Other mechanisms for constituting the techno-political membership of this Board could also be considered.)

3.1   The Internet Technical Oversight and Advisory Board will seek to ensure that the various technical and operational functions related to the global Internet are undertaken by the relevant organizations as per international law and public policy principles developed by the concerned international bodies.

3.2   The Technical Oversight and Advisory Board will have a dual role: (1) oversight of decisions of ICANN related to its various functions of managing and coordination of critical Internet resources, and (2) advice on public policy perspectives to various technical standards bodies, and in this regard be the link between public policy bodies and these standards bodies. The function of oversight could be arranged to be undertaken either ex ante - before changes are made in the root files, or ex post - after the changes are made, as confirming them. The advisory role of this Board vis a vis technical standards bodies will be non-binding.

3.2   With regard to ICANN, the role of this Board will be comparable to that exercised by the US government in its oversight over ICANN. As for the decentralized Internet standards development mechanisms, like the Internet Engineering Task Force, these self organising systems based on voluntary adoption of standards will continue to work as at present. The new Board will have operating principles ensuring a very light touch and non-binding role. It will bring in imperatives from, and advise technical standards bodies on, international public policies, international law and norms being developed by various relevant bodies.

3.3   The enable the Board to fulfil its oversight mandate, ICANN must become an international organisation, without changing its existing multistakeholder character in any substantial manner. It would enter into a host country agreement with the US government (or with the government of another country). It would have full immunity from national law and executive authority, and be guided solely by international law, and be incorporated under it. Supervision of the authoritative root zone server would also be transferred to this Board, and it would exercise this role with the help of an internationalised ICANN.

3.4　　This board will also advise the afore-mentioned new public policy body on technical matters pertaining to the Internet policy making, as well as take public policy inputs from it.

4. Framework Convention on the Internet: An appropriate international legal framework will be required sooner rather than later for the above bodies to function properly. Accordingly, one of the early tasks of the proposed "new body" dealing with Internet-related public policy issues, discussed above, will be to help negotiate a "Framework Convention on the Internet" (somewhat similar to the Framework Convention on Climate Change[3]). Governance of the Internet concerns a variety of issues that are ever evolving. It is, therefore, preferable to formulate an enabling legal structure as a "framework convention" rather than as a specific treaty or convention that addresses only a bounded set of issues.

4.1　　Such a Framework Convention can initially introduce a series of principles, protocols and processes that can then frame further treaties, agreements, etc. on more specific issues. It will thus enable appropriate and ongoing global policy responses to various opportunities and challenges presented by the fast-evolving phenomenon of the Internet. It will also formalise the basic architecture of the global governance of the Internet; *inter alia* recognising and legitimising the existing roles and functions of the various bodies currently involved with managing the technical and logical infrastructure of the Internet, including the ICANN, Regional Internet Registries, Internet technical standards bodies and so on.

4.2　　There will also be a need for the development of institutional mechanisms for crisis response and dispute resolution in relation to the global Internet, and the social activities that depend on it.

4.3　　The idea of a framework convention, and/or greater involvement of UN institutions, has been criticized for various reasons, including a reduction of democracy, infringement on national sovereignty, threats to freedom of speech, a risk of slowing innovation.

4.4　　In our view, only appropriate government involvement can ensure democracy, for a number of reasons: Private companies are not democratic institutions and are obliged to act in the interests of owners and shareholders; nations can and frequently do limit their sovereignty voluntarily by agreeing treaties, and such treaties are binding only after they are ratified by national parliaments, thus ensuring the respect of democratic decision-making; human rights, including the right to free speech, are protected by customary internal law enunciated in the Universal Declaration of Human Rights and cannot be limited by any of the mechanisms outlined above; and appropriate government intervention can foster competition and innovation, and indeed calls for net neutrality regulation are intended to have exactly this effect.

5. Funding: Recognising that the current process of domain name registration in reality acts as a license fee or excise tax on Internet users, funding for the proposed new global Internet policy mechanisms would come from the collections made by

relevant bodies from the allocation of naming and numbering resources pertaining to the global Internet (like the fee that ICANN collects annually from each domain name owner). These accruals now run into millions of dollars every year and could be adequate to fund a large part of the needed mechanisms for democratic governance of the global Internet.