ESSAY

GOVERNMENTS, PRIVATIZATION, AND "PRIVATIZATION": ICANN AND THE GAC

*Jonathan Weinberg**

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (ICANN) sets the rules for the Internet addressing systems that make it possible for users to send email, view webpages, or otherwise connect to Internet resources. Its most visible function is to supervise the domain name system, which identifies Internet resources by "domain names" such as "wayne.edu" or "threecats.net." ICANN's control gives it authority over how domain names are structured and what they look like; it gives it regulatory and economic power over a substantial set of businesses involved with Internet addressing.

This is no small thing. Individuals and businesses, today, control (and pay for) over 200 million domain names.[1] And ICANN's decisions have

    1.   *See The Domain Name Industry Brief*, VERISIGN (Nov. 2010), http://www.verisigninc.com/assets/Verisign_DNIB_Nov2010_WEB.pdf.

bite: they are responsible for mechanisms such as the "uniform dispute resolution policy" that divests registrants of names deemed too similar to other entities' trademarks,[2] along with a variety of other mechanisms designed to fence off particular categories of domain names from registration by the wrong people (or by anyone at all).[3] They determine what sort of names are visible on the Net, and what sort are not.[4]

What kind of organization, then, is ICANN? It is in form a private body, a California-based § 501(c)(3) nonprofit corporation.[5] Yet when it comes to ICANN, the usual lines between what is private and what is public have always been blurred. In this Essay, I will address the relationship between ICANN and national governments, and how that relationship has changed over time. I'll discuss the changing nature of ICANN's relationship with the U.S. government, as well as the evolution of other national governments' policy-making role within ICANN.

The U.S. government was deeply involved with ICANN at the time of its formation; other world governments played a much smaller role. Those governments' functional role remained narrow even after ICANN's reinvention in 2002 gave them a greater formal say. In recent years, though, the United States has channeled most of its interaction with ICANN into a multilateral forum—ICANN's Government Advisory Committee (GAC), with representatives from a wide range of national governments—and the GAC has been increasingly involved in ICANN processes. But in part by virtue of an institutional structure carried over from the organization's formation, when it was thought that world governments should have little formal role in a "privatized" ICANN, the relationship today between ICANN and national governments is incoherent and problematic.

---

2.   *See generally* Konstantinos Komaitis, The Current State of Domain Name Regulation: Domain Names as Second Class Citizens in a Mark-Dominated World (2010); A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 Brook. L. Rev. 605 (2002).

3.   *See, e.g.*, *.COM Agreement Appendix 6 Schedule of Reserved Names*, ICANN (Mar. 1, 2006), http://www.icann.org/en/tlds/agreements/verisign/appendix-06-01mar06.htm.

4.   *See Domain Name Dispute Resolution Policies*, ICANN, http://www.icann.org/udrp (last visited Oct. 2, 2011). For a discussion of whether ICANN could, in the future, seek to leverage its control over the domain name system to achieve more far-reaching goals, *see* A. Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'*, 9 J. Telecom. & High Tech. L. 187, 214–19 (2010).

5.   *See About ICANN*, http://www.icann.org/en/about/ (last visited Oct. 1, 2011) (describing ICANN as "a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable"); *Articles of Incorporation for Internet Corporation for Assigned Names and Numbers*, ICANN (Nov. 21, 1998), http://www.icann.org/en/general/articles.htm.

I. In the Beginning

The story of ICANN's creation has been told in detail elsewhere.[6] From 1993 to 1998, two actors played crucial roles in the domain name space. The first was Dr. Jon Postel, who had earlier assumed the task of assigning blocks of IP addresses to computer networks and who administered the root zone of the Internet domain name system, with authority over which top-level domains (TLDs) were visible in the name space and which entities had authority to operate them. The second was a company then known as Network Solutions, Inc. (NSI), which performed registration services in the .com, .net, .org, and .edu top-level domains and maintained those domains' master databases.[7] NSI also maintained the computer server containing the authoritative copy of the root zone; it made changes to that file at Postel's direction.[8] The U.S. government funded Dr. Postel via contracts with his employer, the Information Sciences Institute of the University of Southern California.[9] The National Science Foundation (NSF) underwrote NSI's domain registration services until 1995, and maintained additional authority over NSI via an NSF-NSI cooperative agreement until 1998.[10]

In 1998, the U.S. government midwifed a new organization called ICANN, a California nonprofit corporation. ICANN assumed Postel's authority over the root zone, and sought to exert control over NSI.[11] The U.S. government described ICANN's formation and assertion of authority as part of its "privatization of the domain name system."[12] But this description

---

6.   *See generally* Milton L. Mueller, Ruling the Root: Internet Governance and the Taming of Cyberspace (2002); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 Duke L.J. 187 (2000).

7.   Network Solutions, Inc. was acquired by Verisign, Inc. in 2000. *Network Solutions is a Remarkable Company!*, Network Solutions, http://about.networksolutions.com/site/network-solutions-is-a-remarkable-company/ (last visited Oct. 2, 2011). Verisign still operates the .com and .net registries, *Verisign Domain Name Registries*, VeriSign, http://www.verisigninc.com/en_US/products-and-services/domain-name-services/index.xhtml?loc=en_US (last visited Sept. 6, 2011), as well as the .gov registry under a contract with the General Services Administration, *DOTGOV Internet Domain Name Registration Service*, Fed. Bus. Opportunities, https://www.fbo.gov/index?s=opportunity&mode=form&id=5e6b0085f30c96 bbc4ebee4c5a679a45&tab=core&_cview=1 (last visited Oct. 2, 2011). Verisign's revenues from domain name services exceed $600 million annually. *Fact Sheet*, VeriSign, https://investor.verisign.com/factsheet.cfm (last visited Sept. 6, 2011). In 2003, it spun off a subsidiary with the "Network Solutions" name to operate as a domain name registrar. *Network Solutions is a Remarkable Company!*, Network Solutions, http://about.networksolutions.com/site/network-solutions-is-a-remarkable-company/ (last visited Oct. 2, 2011).

8.   *See* Weinberg, *supra* note 6, at 199.

9.   *Id.* at 198.

10.   *Id.* at 198–200; *see also* Mueller, *supra* note 6, at 182.

11.   Interested parties had initially planned that Postel would serve as ICANN's Chief Technical Officer. Postel died unexpectedly, though, just as ICANN was being formed. *See* Weinberg, *supra* note 6, at 210.

12.   *See, e.g.*, U.S. Dep't of Commerce, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31,741 (June 5, 1998), *available at* http://www.icann.org/en/general/white-

obscured more than it revealed. To be sure, the U.S. government had funded the development and maintenance of the naming and addressing infrastructure. But Postel had made his key decisions without meaningful policy supervision by the U.S. Department of Defense, and NSI had made its own with only a limited degree of supervision by the National Science Foundation.[13] In that sense, domain name decision-making had been essentially private all along.[14]

Before ICANN's creation, U.S. government authority over the domain name space was unclear. Key actors denied or challenged that authority. Those actors included NSI, which took the view that it owned the .com, .net, and .org registration databases, and—upon the expiration in 1998 of its five-year cooperative agreement with the National Science Foundation—would be free to do whatever it wanted with them.[15] They included a new body called the International Ad Hoc Committee (IAHC), set up in 1996 with Postel's blessing, which sought to establish its own new domain naming order.[16] They included Postel himself: in January 1998, Postel famously attempted to demonstrate his independence from U.S. policy supervision and control by directing the root server operators to take their copies of the root zone directly from him, rather than from the NSI-operated server on which the authoritative root zone was then stored. White House senior adviser Ira Magaziner, then in charge of the U.S. government's domain name policy

---

paper-05jun98.htm; *Amendment 6 to ICANN/DOC Memorandum of Understanding*, ICANN (Sept. 17, 2003), *available at* http://www.icann.org/en/general/amend6-jpamou-17sep03.htm (explaining that the formation of ICANN was part of a process "of privatizing the technical management of the Internet and its underlying domain name system (DNS) now performed by or on behalf of the U.S. Government or by third parties under arrangements or agreements with the U.S. Government").

13.   "Limited" supervision, to be sure, is not the same as no supervision. A variety of NSI registration policies—including an initial ban on multiple domain name registrations by a single entity, as well as other policies directed towards making registration easy—stemmed from NSF policy choices. *See* Froomkin, *supra* note 6, at 106–7. But NSF, which saw itself as a funding agency rather than a regulatory one, was increasingly disinclined to engage in first-order domain-name policymaking after it stopped underwriting the registration process in 1995. The Defense Department, for its part, ended any involvement in the substance of domain name decision-making in the 1980s (although a well-informed industry observer has conveyed his recollection to me that the Department's "contract technical representative" was involved in that decision-making during the early days of the domain name system). *See* E-mail from Anthony M. Rutkowski to author (July 6, 2000) (on file with author).

14.   *See* Harold Feld, *Structured to Fail: ICANN and the "Privatization" Experiment, in* Who Rules the Net? Internet Governance and Jurisdiction 333 (Adam Thierer & Clyde Crews, Jr. eds., 2003).

15.   *See Domain Name System Privatization: Is ICANN Out of Control?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 106th Cong. 104–12 (1999) (testimony of Jim Rutt, CEO, Network Solutions).

16.   *See* Craig L. Simon, Launching the DNS War: Dot-Com Privatization and the Rise of Global Internet Governance (Dec. 2006) (unpublished Ph.D. dissertation, University of Miami), *available at* http://www.scribd.com/doc/58805571/Launching-the-DNS-War-Dot-Com-Privatization-and-the-Rise-of-Global-Internet-Governance.

process, is said to have threatened Postel with criminal charges unless he rescinded that direction.[17]

The U.S. government won that round; Postel withdrew his direction. And the government was similarly able to beat back the challenge from IAHC by directing NSI to decline to make the changes in the root zone that would be needed to implement the IAHC plan.[18] But these were assertions of government authority made *in the course of* the U.S. government's professed "privatization." The key move in the creation of today's Internet governance structure, thus, was not the abdication of U.S. government authority, but its assertion at a time when that authority was highly contested. As Sebastian Botzem and Jeanette Hofmann have put it, "the U.S. government imposed public authority onto a largely self-regulatory structure with the official objective of privatizing it"—a move whose "inherent contradiction became obvious" shortly afterwards.[19]

It's not really surprising that the U.S. government should have sought to impose its own authority over Internet addressing. Government decision-makers, after all, thought the domain-name and IP-address system was important, and wanted to set it on what they deemed to be the best possible institutional and policy footing. The U.S. government thus established an interagency working group in 1997 to consider domain name policy, passed that group's work product to Magaziner for further consultations and development, and after a long slog finally succeeded in seeing a modified version of that policy reflected in ICANN's founding documents.[20]

The resulting structure, while setting out a strong ICANN policy-making role, also gave the U.S. government the opportunity to exercise extensive authority.[21] Especially at the outset, ICANN was highly dependent on U.S. government support in its battles to exercise authority, in particular over NSI. As Stuart Lynn, ICANN's then-CEO, put it in 2002: "[E]ach of ICANN's accomplishments to date have all depended, in one way or another, on government support, particularly from the United States."[22] Moreover,

---

17.   *See id.* at 55 (Postel backed down facing "threats made in the name of the US Government"); Froomkin, *supra* note 6, at 64–65; *see also* Mueller, *supra* note 6, at 161–62; Weinberg, *supra* note 6, at 205 n.92.

18.   *See* Weinberg, *supra* note 6, at 205; *see also* Mueller, *supra* note 6, at 158–59.

19.   Sebastian Botzem & Jeanette Hofmann, *Transnational Governance Spirals: The Transformation of Rule-Making Authority in Internet Regulation and Corporate Financial Reporting*, 4 Critical Pol'y Stud. 18, 18–37 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706177; *see also* Feld, *supra* note 14, at 361 ("ICANN represented a step away from privatization to a regulated regime.").

20.   *See generally* Weinberg, *supra* note 6.

21.   Botzem & Hofmann have referred to the resulting institution as displaying a "hybridization of private and public authority." Botzem & Hofmann, *supra* note 19, at 21.

22.   *President's Report: ICANN—The Case for Reform*, ICANN (Feb. 24, 2002), *available at* http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm. He continued:

US government help was critical to obtaining ICANN's first registry agreements [with NSI]. All the other agreements that ICANN has achieved have depended, ul-

the U.S. government retained a veto over any ICANN action pertaining to the contents of the root zone. As a practical matter, then, during ICANN's formative period, the U.S. government was first on the list of actors that ICANN simply could not afford to antagonize.

Law professor A. Michael Froomkin, not long after ICANN's formation, argued that ICANN's founding documents and initial practice gave the U.S. government the power to veto essentially all of its decisions.[23] The U.S. Department of Commerce, he continued, had so much control over ICANN's operations as to make its failure to countermand any ICANN decision reviewable in federal court under the Administrative Procedure Act.[24] While no court adopted this view, the very fact that it could be plausibly argued demonstrates the symbiotic connections between the two bodies.

What about ICANN's relationship with other national governments? ICANN's founding documents contemplated only a weak informal advisory role for those governments, via a body called the Government Advisory Committee (GAC).[25] The GAC was made up of a single representative from each of the national governments that chose to send one. It was there to provide an informal mechanism for governments to communicate their views to ICANN on matters that concerned them; it had no role other than that of giving advice that might or might not be heeded.[26]

In ICANN's early years, the GAC did not play a wide-ranging role. No more than thirty governments, all from more-developed countries, took the trouble to participate.[27] For the most part, it confined its attentions to matters of interest to governments in their institutional capacities, such as the relationship of national governments to the country code top-level domains (ccTLDs), such as .fr and .uk, assigned to entities within each country.[28]

---

timately, on the willingness of the US government to make it clear . . . that it was not receptive to changes in the authoritative root zone file that were not managed through the ICANN process.

23.   *See* Froomkin, *supra* note 6, at 111.

24.   *See id.* at 125–38.

25.   *See Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (Nov. 6, 1998), *available at* http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm#VII (ICANN's original 11/6/98 bylaws, providing for a Government Advisory Committee, composed of representatives of national governments, to "consider and provide advice on [ICANN] activities . . . as they relate to concerns of governments," and committing the ICANN Board, after putting a proposal out for public comment, to "consider any [GAC] response . . . prior to taking action").

26.   *See id.*

27.   *See* Wolfgang Kleinwæchter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources,* 36 Loy. L.A. L. Rev. 1103, 1116 (2003).

28.   *See* Paul Twomey, *Governmental Advisory Committee Commentary on the Names Council Resolution*, ICANN (Oct. 26, 2001), *available at* http://www.icann.org/en/committees/gac/names-council-resolution-commentary-26oct01.htm; *Principles for Delegation and Administration of ccTLDs*, ICANN (Feb. 23, 2000), *available at* http://www.icann.org/en/committees/gac/gac-cctldprinciples-23feb00.htm.

Although Jon Postel had delegated authority to run most ccTLDs to non-governmental entities, national governments historically had thought of the ccTLDs as "belonging" to them; the question of national-government authority over the ccTLDs had been a matter of contention for years.[29]

The GAC also focused on the registrability of country names and codes as domain names, and on the development of so-called "internationalized" domain names—that is, domain names using other than English-language characters, a matter taken seriously by governments whose official languages used such characters.[30] It paid little attention to most other issues within ICANN's scope.[31]

There was a reason the GAC had no formal role in the ICANN policy process: the rhetoric of privatization demanded it. The initial ICANN structure deliberately cut world governments out of the policy development process. The United States government, overseeing that process, saw its agenda as "support[ing] the efforts of private sector organizations to develop mechanisms to facilitate the successful operation of the Internet."[32] ICANN's framers contemplated, and its bylaws enshrined, an elaborate policy process in which a wide range of interested *private* parties would together, in working groups and otherwise, craft a policy that could be presented to the Board as a purported community consensus. World governments weren't to be part of that bottom-up deliberative process. Instead, the ICANN bylaws set up separate channels for informal government advice.

---

29.   For example, in 1986 Postel delegated authority over .au to one Robert Elz, a network engineer at the University of Melbourne. ICANN staff redelegated that authority in 2001, over Elz's objection, to an entity endorsed by the Australian government. *See* A. Michael Froomkin, *How ICANN Policy is Made (II)*, ICANNWATCH (Sept. 5, 2001), http://www.icannwatch.org/essays/dotau.htm; *IANA Report on Request for Redelegation of the .au Top-Level Domain*, INTERNET ASSIGNED NUMBERS AUTHORITY (Aug. 31, 2001), http://www.iana.org/reports/2001/au-report-31aug01.html.

30.   *See, e.g.*, *Communiqué of the Governmental Advisory Committee*, ICANN (Sept. 9, 2001), http://www.icann.org/en/committees/gac/communique-09sep01.htm.

31.   The GAC did issue one early statement on a broader matter. *See Opinion of the Governmental Advisory Committee on New Generic Top Level Domains*, ICANN (Nov. 16, 2000), http://www.icann.org/en/committees/gac/new-tld-opinion-16nov00.htm. Even in that document, however, the most important points related to internationalized domain names and restriction of the use of country names in domain names. Notwithstanding the expansion of the GAC role that I note later in this Essay, an informed observer was able to write in 2010 that GAC "interventions in ICANN policy processes, almost without exception, have been to claim special benefits or powers *for its member governments*." MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE 244 (Mass. Inst. of Tech. ed., 2010).

32.   *Read the Framework*, THE WHITE HOUSE, http://clinton4.nara.gov/WH/New/Commerce/read.html (last visited Oct. 3, 2011). ICANN's bylaws explicitly barred government officials from serving on the organization's board. *See Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (Nov. 6, 1998), http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm#V.

II. The GAC's Changing Role

The era of strong, sustained U.S government involvement in ICANN didn't last. Through the end of 1999, U.S. officials were deeply involved in ICANN matters; they sought in particular to use their leverage over NSI to overcome its disinclination to recognize ICANN authority. That dispute was finally resolved with the signing of a set of new contracts at the end of 1999, giving ICANN more nearly solid legal authority over NSI but assuring NSI's commercial position.[33]

But U.S. government attention to ICANN waned. Ira Magaziner, who more than anyone else in the U.S. government had brought ICANN into being, left his government position in 1998.[34] J. Beckwith Burr, who had also been instrumental in ICANN's formation, left at the end of 2000.[35] At that point, ICANN policy was largely in the hands of a Department of Commerce employee named Karen Rose, just five years out of college.[36] It is unclear how intimately Rose and her successors in the small Office of International Affairs of the National Telecommunications and Information Administration within the Department of Commerce were involved with ICANN matters. Certainly they reacted to particular ICANN-related controversies and were involved with the periodic reauthorization of ICANN's Memorandum of Understanding. Rose lobbied ICANN on such matters as its actions to bring about a centralized public "WHOIS" database containing information identifying domain name registrants.[37] But the folks who worked in that small corner of the Commerce Department didn't have support from their superiors for ICANN involvement that would incur political costs on the domestic U.S. front. Too-close, publicly-acknowledged involvement in ICANN decision-making would be a source of political controversy and headaches. From the perspective of the National Telecommunications and Information Administration, as one observer later put it, "ICANN is a royal pain in the ass."[38]

As ICANN emerged from its first three years of existence, thus, while it was sensitive to the desires of governments, it was not burdened by a need to work with them too much. One could be forgiven for thinking that ICANN staff, at this point in the organization's existence, would see ad-

---

33.   *See* Mueller, *supra* note 6, at 194–96.

34.   *See* Jeri Clausing, *Clinton's Envoy to the Internet Will Resign by Year's End*, N.Y. Times (Nov. 9, 1998), *available at* http://www.nytimes.com/1998/11/09/business/clinton-s-envoy-to-the-internet-will-resign-by-year-s-end.html.

35.   *See J. Beckwith Burr*, WilmerHale, http://www.wilmerhale.com/becky_burr (last visited Sept. 29, 2011).

36.   *See Karen Rose's Experience*, LinkedIn, http://www.linkedin.com/in/southernseas (last visited Oct. 1, 2011).

37.   *See* Letter from Karen Rose to Michael Roberts, ICANN CEO (Sept. 28, 2000), *available at* http://www.icann.org/en/correspondence/doc-to-icann-28sep00.htm.

38.   E-mail from Harold Feld to author (July 6, 2009) (on file with the author) (quoted with permission).

vantages to this remove from day-to-day interaction with bureaucrats and politicians. In fact, though, three years after ICANN was formed, ICANN's CEO issued a call to action in which he identified the absence of systematic government involvement in ICANN as a crucial—and likely fatal—*flaw* in its structure.[39] CEO Stuart Lynn saw three key challenges facing ICANN. The first was the fact that it had not yet entered into the agreements it was seeking with key domain name players—the various root server operators, the regional IP address registries, and most of the ccTLD operators— recognizing ICANN's authority and formalizing their interaction. The second was what he characterized as ICANN's "unrealistic" and "Sisyphean" preoccupation with finding a workable mechanism for public representation and accountability. The third was a lack of funds.[40]

If national governments were more directly involved in ICANN, Lynn reasoned, they would have greater incentive to pressure their ccTLDs to enter into contracts with ICANN formally recognizing its authority.[41] National governments also could supply ICANN with funding it badly lacked;[42] ICANN could use some of that money to buy the cooperation of the root server operators.[43] And, because national governments were in Lynn's words "the most evolved and best legitimated representatives of their populations," they were the answer to any questions about ICANN's democratic legitimacy.[44] In order to secure all of these benefits, and to get the buy-in that would induce national governments to take these steps, Lynn proposed a new "public-private" structure for ICANN, in which fully a third of its Board members would be named directly by the GAC or by national governments.[45]

The "Board seats for governments" plan was not popular with ICANN's various constituencies. Nongovernmental entities saw no basis for the

---

39.   *See* Stuart Lynn, *President's Report: ICANN—The Case for Reform*, ICANN (Feb. 24, 2002), *available at* http://www.icann.org/en/general/lynn-reform-proposal-24feb02.htm.

40.   *See id.*

41.   *See id.* (bemoaning the fact that many ccTLD registries were "unwilling (despite all the rational arguments and history to the contrary) to accept voluntarily the existence and authority of a global coordinating entity," and explaining that by virtue of government involvement in ICANN, those governments would "more effectively encourage" their ccTLDs' participation).

42.   *See id.* ("All of the participants in the ICANN process that have the ability to pay a share of ICANN funding should do so. With 'skin in the game,' these participants will feel a more immediate and direct connection to the success of the ICANN process. And this includes governments.").

43.   *See id.* ("[W]e must move to a system where the root server operators are compensated for their critical services . . . . [W]e will ultimately need a more definitive and binding set of arrangements with the current and any future root name server operators, and that will require significantly greater funding than is presently available to ICANN.").

44.   *Id.*

45.   *See id.* The government-chosen Board members, however, would not themselves be "governmental employees with policymaking responsibilities." Rather, governments would select worthy private citizens for those Board seats.

conclusion that giving governments a bigger ICANN role, and having them provide more funding, would be an improvement.[46] Governments appeared no more enthusiastic. [47] A European Commission response suggested that Lynn's proposal was a "radical redefinition of the relationship between the public and private sector actors in the Internet," and emphasized the EU's historic "support [of] the principle of private sector self-regulation."[48] A letter signed by the bipartisan leadership of the U.S. House Commerce Committee and the relevant subcommittee urged that the overall effect of Lynn's proposed changes would "make ICANN even less democratic, open, and accountable than it is today."[49] Governments may have seen little in the proposal for them; after all, the benefit to any particular national government of there being five people on the ICANN Board who had been selected by the GAC, but who nonetheless likely hailed from some *other* nation, wasn't great.

ICANN did, though, make key changes to its internal structure as a result of Lynn's initiative.[50] The most important, for this Essay's purposes,

---

46.   *See, e.g.*, Alex Pawlik, Managing Director, RIPE NCC, *The RIPE NCC Response to the ICANN Reform Proposal Document*, RIPE Network Coordination Centre (Mar. 2002), http://www.ripe.net/internet-coordination/news/announcements/the-ripe-ncc-response-to-the-icann-reform-proposal-document ("Our experience shows that funding by governments and other third parties often brings disadvantages for the organisation receiving the funds, as there are usually direct or indirect strings attached. Funding should be provided by those using ICANN's services.").

47.   The GAC made no formal substantive statement relating to Lynn's initial proposal. *Cf.* Governmental Advisory Comm., *GAC Communiqué #12*, ICANN (Mar. 11–12, 2002), *available at* https://gacweb.icann.org/download/attachments/1540200/GAC_12_Accra_Communique.pdf?version=1&modificationDate=1312230084000 ("[I]t would be premature to comment on the most appropriate framework and structure for this private-public partnership . . . ."). ICANN established a Committee on ICANN Evolution and Reform to further develop the proposal; that committee eventually dropped the idea of government selection of Board members, while proposing that the GAC should appoint a nonvoting Board liaison. *See ICANN: A Blueprint for Reform*, ICANN (June 20, 2002), http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm. A majority of GAC members, while rejecting the concept of governments funding the ICANN budget, supported the nonvoting liaison concept. Governmental Advisory Comm., *Statement on ICANN Reform*, ICANN (June 26, 2002), http://www.icann.org/en/committees/gac/statement-on-reform-26jun02.htm. France, Germany, Spain, and Switzerland, however, criticized the presence of even a nonvoting GAC representative on the Board, because "it would lead the GAC representative to deal with matters which have no direct public interest implication, create difficulties in discussions about topics where there is no GAC consensus, and be incompatible with GAC independence." *Id.*

48.   Press Release, Europa, Telecom Council (Mar. 25, 2002), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/65&format=HTML&aged=1&language=EN&guiLanguage=en.

49.   Letter from W. J. "Billy" Tauzin, Chairman, U.S. House Commerce Comm. et al. to Donald L. Evans, Sec'y of Commerce (Mar. 13, 2002), *available at* http://www.icannwatch.org/article.pl?sid=02/03/14/122633&mode=thread.

50.   They included a more robust and lucrative mechanism for getting funding from domain name industry actors. That new mechanism proved crucial to ICANN's later success. *See* Jonathan Weinberg, *Non-State Actors and Global Informal Governance—The Case of ICANN* 21 (Wayne State Univ. Law Sch., Legal Studies Research Paper Series No. 10-05).

was this: under the post-2002 rules, the GAC has free-wheeling authority to "advise" the ICANN Board on public policy matters, and if the Board chooses not to take GAC advice, its bylaws require that the Board and GAC "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution." If "no such solution can be found," the Board is free to implement its preferred policy after explaining the reasons for its choice.[51]

It's plausible that what many governments wanted most from ICANN at the time, besides a greater degree of control over their local ccTLDs, was a mechanism allowing them to step in and exert influence reactively, in case ICANN seemed about to do something that threatened their interests[52]—and that's just what the strengthened GAC mechanism seemed designed to give them.[53]

The 2002 bylaws change had little immediate operational effect. The GAC's involvement in ICANN controversies continued to be episodic, reactive, and peripheral. The GAC did establish six internal working groups in 2003, addressing a range of important issues.[54] But its involvement

---

For the amended bylaws that were the product of ICANN's self-designated 2002 "Evolution and Reform" process, see *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (Dec. 15, 2002), *available at* http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm. For a scholarly symposium discussing the resulting changes, see A. Michael Froomkin, *ICANN 2.0: Meet the New Boss*, 36 Loy. L.A. L. Rev. 1087 (2003).

51.   *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (June 24, 2011), *available at* http://www.icann.org/en/general/bylaws.htm#XI. The new rules also gave the GAC a nonvoting Board liaison.

52.   The GAC statement, *supra* note 47, emphasized that "government[s] . . . are responsible for public policy" and that the GAC's advice on public policy matters must be "duly taken into account both at the policy-drafting and at the decision-taking stage." Governmental Advisory Comm., *Statement on ICANN Reform*, ICANN (June 26, 2002), http://www.icann.org/en/committees/gac/statement-on-reform-26jun02.htm.

53.   Michael Froomkin has argued that enhancing the role of the GAC in 2002 gave ICANN important political advantages, both helping it to make friends outside the U.S. and giving it a presence in commerce and trade-based ministries that could act as a counterweight to communications ministries allied with the International Telecommunications Union. *See* Froomkin, *supra* note 4, at 196.

It's also worth noting that Paul Twomey, who assumed the job of ICANN CEO in March 2003, had been an official of the Australian government and chair of the GAC until November 2002, when he stepped down to launch an advisory and investment firm. Some see Twomey's CEO appointment as a product of ICANN's desire to have a "government person" at the helm to address the threat posed by the World Summit on the Information Society. Kieran McCarthy, *So what does that weird GAC wording actually mean?*, Kieren McCarthy [dotcom] (Jan. 27, 2011), http://kierenmccarthy.com/2011/01/27/so-what-does-that-weird-gac-wording-actually-mean/.

54.   The working groups addressed ccTLDs, internationalized domain names, generic top-level domains, the security of the domain name system, IPv6 (a new system for distributing IP addresses that would impose substantial costs on large users), and WHOIS (that is, the public availability of information identifying domain name registrants). *See* Governmental Advisory Comm., *Meeting 15: Rio De Janeiro*, ICANN (Mar. 23–25, 2003), https://gacweb.icann.org/download/attachments/1540182/GAC_16_Rio_de_Janeiro_Communique.pdf; *see also* Governmental Advisory Comm., *GAC WHOIS Working Group Discussion Paper*,

in the ICANN policymaking process before the summer of 2005 was infrequent.[55]

Two developments helped to shift the GAC's role. First, world governments were becoming more attuned to ICANN-related issues. Some of those governments had grown frustrated with ICANN's U.S.-centrism, and others with its status as an informal, private organization rather than an intergovernmental body.[56] The World Summit on the Information Society (WSIS), a United Nations forum bringing together representatives of government, business, and civil society, became a focus for that frustration: a draft WSIS Declaration of Principles in March 2003 urged that domain-name management "must be multilateral, democratic and transparent, taking into account the needs of the public and private sectors as well as those of the civil society." To that end, it continued, ICANN's responsibilities "should rest with a suitable international, intergovernmental organization."[57]

This was a naked challenge: ICANN is not an intergovernmental organization. The International Telecommunications Union is, and some developing country governments would have preferred to see ICANN supplanted by the ITU. It was never plausible, though, that the WSIS process would end with a decision that ICANN should be ousted of its authority.[58] WSIS ended with no more than an agreement to create a new venue in which participants would continue to discuss Internet governance. That venue was named the Internet Governance Forum; its discussions have posed no challenge to ICANN authority.[59]

ICANN (June 22, 2003), http://www.icann.org/en/committees/gac/whois-discussion-paper-22jun03.htm.

55.   See GAC Communiqués for Meetings 1-22, *archived at* https://gacweb.icann.org/display/gacweb/GAC+Meetings+Archive (revealing only infrequent involvement). It appears that the GAC's only significant attempts to influence ICANN policy from mid-2003 to mid-2005 related to ccTLDs (the GAC in April 2005 adopted a new version of its principles for ccTLD delegation and administration) and WHOIS (including some lobbying for speedy law enforcement access to WHOIS data). *See* Governmental Advisory Comm., *GAC Communiqué – Luxembourg*, ICANN (July 9–12, 2005), https://gacweb.icann.org/download/attachments/1540184/GAC_23_Luxembourg.pdf?version=1&modificationDate=1312229243000.

56.   *See* Weinberg, *supra* note 50, at 14–16. *See generally* MUELLER, *supra* note 31, at 55–80 (describing the origins of the World Summit on the Information Society).

57.   World Summit on the Info. Soc'y, *Draft Declaration of Principles*, at 5, Doc. WSIS/PCIP/DT/1-E (Mar. 21, 2003), http://www.itu.int/dms_pub/itu-s/md/03/wsispcip/td/030721/S03-WSISPCIP-030721-TD-GEN-0001!!MSW-E.doc.

58.   No First World country supported ICANN's ouster. The European Union did express support for a greater role for governments in high-level policymaking concerning Internet names and numbers, but emphasized the need to "build on the existing structures of Internet Governance" rather than replacing them. World Summit on the Info. Soc'y, *Proposal for Addition to Chair's Paper Sub-Com A Internet Governance on Paragraph 5 "Follow-up and Possible Arrangements,"* at 1, Doc. WSIS-II/PC-3/DT/21-E (Sept. 30, 2005), *available at* http://www.itu.int/wsis/docs2/pc3/working/dt21.pdf.

59.   *See* Milton Mueller, *The IGF and the Internet Society-ITU Rivalry*, THE INTERNET GOVERNANCE PROJECT (Nov. 20, 2009, 4:38 PM), http://blog.internetgovernance.org/blog/_archives/2009/11/20/4385849.html (describing the influence of ICANN supporters, including the Internet Society, within the IGF).

At the same time, the WSIS process helped shift the conventional wisdom about Internet governance in a way that contributed to a change in the GAC's role. One of the challenges to ICANN's authority mediated by WSIS was a claim that ICANN was making public policy decisions that rightfully should be made only by governments; ICANN's defenders pushed back with a "multistakeholder" model[60] in which governments had a legitimate role to play in the governance process, mediated through ICANN, along with other "stakeholder" groups.[61]

It's important to grasp the rhetorical shift that took place here. The language of ICANN's founding contemplated governance by multiple Internet "stakeholders"; the White House, thus, described ICANN as "formed by private sector Internet stakeholders to administer policy for the Internet name and address system."[62] But those "stakeholders," as the White House language reveals, were all from the private sector. The new "multistakeholderism," by contrast, saw Internet name and address policy as the product of discussions among governments together with business and civil society.[63]

The final WSIS document (the "Tunis Agenda") made plain that governments—along with "the private sector, civil society and international organizations"—should be fully involved in the international management of the Internet.[64] It characterized "authority for Internet-related public policy issues" as "the sovereign right of States."[65] It referenced "multistakeholderism" more than a dozen times,[66] institutionalizing a new way of conceiving the government role in ICANN, and laid the foundation for a greater role for governments in ICANN via the GAC.[67]

All of this took place on the level of diplomat-speak and theory, though; it took concrete events to move the story along. They began in the spring of 2004, when a private entity called ICM Registry proposed to establish an .xxx top-level domain, "intended primarily to serve the needs of the global

---

60.   *See, e.g.*, World Summit on the Info. Soc'y, *Tunis Agenda for the Information Society*, ¶¶ 37, 41, 67, 72, 73, 78, 83, 97, 98, 101, 102, 105, 108, 110, Doc. WSIS-05/TUNIS/DOC/6(Rev. 1)-E (Nov. 18, 2005), http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

61.   *See* MUELLER, *supra* note 31, at 69.

62.   U.S. Dep't of Commerce, *supra* note 12, at 31,749.

63.   The term was already in use in certain other contexts. *See, e.g.*, Joel Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1358–59 (2000) (describing a "multistakeholder approach" as one in which "national governments . . . have an ongoing dialog with all stakeholders, including industry and privacy advocacy groups as well as independent experts and scholars").

64.   World Summit on the Info. Soc'y, *supra* note 60, ¶ 29.

65.   *Id.* ¶ 35.

66.   *See id.* ¶¶ 1–122.

67.   *See* MUELLER, *supra* note 31, at 77–78. I am indebted to Fiona Alexander for emphasizing this point to me.

online adult-entertainment community."[68] In June 2005, the ICANN Board voted to approve that proposal.[69] Controversy followed.[70]

National governments had not been engaged with the .xxx issue before the ICANN decision. Indeed, a letter from GAC chair Mohamed Sharil Tarmizi just two months before stated that "[n]o GAC members have expressed specific reservations or comments" about any of the pending top-level domain applications.[71] Once the decision was made, though, representatives of a variety of national governments used the GAC forum to express their concern.[72] The U.S. government was not among the objectors initially; at first, it sought to minimize complaints in the GAC, suggesting that they should have been made earlier.[73] But within ten weeks, following campaigns against the decision by such organizations as the Family Research Council and Focus on the Family, the U.S. government came to play a leading role in opposition to the .xxx domain.[74]

There followed letters expressing concern about, or seeking reconsideration of, ICANN's decision on .xxx from the U.S. Department of Commerce, the chair of the GAC, and the governments of Australia, the

---

68.   *New sTLD RFP Application*, ICANN (Mar. 19, 2004), http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm.

69.   In form, the Board's resolution merely authorized ICANN staff to enter into contract negotiations with ICM. *See Special Meeting of the Board Minutes*, ICANN (June 1, 2005), http://www.icann.org/en/minutes/minutes-01jun05.htm; *see also* Joi Ito, *Some Notes on the .XXX Top-Level Domain*, CIRCLEID (June 2, 2005, 6:07 PM), http://www.circleid.com/posts/some_notes_on_the_xxx_top_level_domain. An arbitration panel, however, later found that the Board's June 2005 vote definitively resolved that ICM met the selection criteria and was entitled to the domain, after completing contract negotiations relating to commercial and technical details. *See* ICM Registry v. ICANN, Case No. 50 117 T 00224 08, at 64–69 (Int'l Ctr. for Dispute Resolution Feb. 19, 2010), *available at* http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf.

70.   For a detailed retelling of the .xxx story, see The Berkman Centr. for Internet & Soc'y at Harvard Univ., *Accountability and Transparency at ICANN*, ICANN (Dec. 31, 2010), http://www.icann.org/en/reviews/affirmation/atrt-review-berkman-final-report-20oct10-en.pdf; *see also* MUELLER, *supra* note 31, at 71–73.

71.   *See Correspondence from GAC Chairman to the ICANN CEO*, ICANN (Apr. 3, 2005), *available at* http://www.icann.org/en/correspondence/tarmizi-to-twomey-03apr05.htm.

72.   *See ICM Registry*, Case No. 50 117 T 00224 08 at 11–14.

73.   *See id.* at 11, 13 (summarizing GAC minutes and communiqué). "USA remarked that GAC had several [earlier] opportunities to raise questions . . . . USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level." *Id.*

74.   *See id.* at 16. Events of that ten-week period also included President Bush's appointment of a new Deputy Secretary of Commerce. *See* MILTON MUELLER, *.XXX Puzzle Pieces Start to Come Together: And the Picture is Ugly*, CIRCLEID (Aug. 17, 2005, 9:16AM), http://www.circleid.com/posts/xxx_puzzle_pieces_start_to_come_together_and_the_picture_is_ugly. A useful history of the U.S. government's response can be found in the *Review of Documents Released under the Freedom of Information Act in the .XXX Case*, INTERNET GOVERNANCE PROJECT (May 16, 2006), *available at* http://internetgovernance.org/pdf/xxx-foia.pdf. For more on the FOIA litigation, see generally ICM Registry v. Dep't of Commerce, 538 F. Supp. 2d 130 (D.D.C. 2008).

United Kingdom, Canada, Sweden, and Brazil, as well as the Deputy Direc-
tor-General of the European Commission.[75] After further rounds of debate,
with the GAC weighing in at all stages, ICANN ended up withdrawing its
approval.[76] National governments had become involved with the issue late in
the day, but their objections were powerful.

The .xxx incident had two important consequences. First, ICANN had
earlier agreed that an international arbitration tribunal would have jurisdic-
tion to hear certain challenges to its decisions.[77] ICM Registry sought review
of ICANN's decision. The review panel ruled that ICANN's about-face on
.xxx after the blossoming of U.S. and GAC objections "was not consistent
with the application of neutral, objective and fair documented policy," and
therefore violated its obligations.[78] While the panel's authority was only
advisory, the ICANN Board accepted its findings, and in 2011 formally ap-
proved the domain's inclusion in the root.[79]

Second, as part of its campaign against the .xxx domain, the United
States had encouraged GAC members to weigh in, individually and as an
organization, to exert such influence as they could in the ICANN arena.[80]
Empowered by that experience, GAC members sought to make their views
known more broadly. Most immediately, the .xxx experience led the GAC to
develop a set of Principles for New Top Level Domains. This document
spoke to the process for adding any new "generic" top-level domain
(gTLD), which in ICANN's taxonomy meant any top-level domain that was
not a ccTLD identified with a particular country. An early version of the

75.   *See ICM Registry*, *supra* note 69, at 14–18; Letter from Marcelo de Carvalho
Lopes, Sec'y of Info. Tech. Pol'y, Brazil, to Mohamed Sharil Tarmizi, GAC Chair (Sept. 6,
2005), *available at* http://www.icann.org/en/correspondence/lopez-to-tarmizi-06sep05.pdf.

76.   *See ICM Registry*, *supra* note 69, at 22–31.

77.   *See Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN
(June 24, 2011), *available at* http://www.icann.org/en/general/bylaws.htm.

78.   *See ICM Registry*, *supra* note 69, at 69–70.

79.   *See Approval of ICM Registry Application for .XXX*, ICANN (Mar. 18, 2011),
http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#5. The GAC in 2011 released a
communiqué noting the "emphatic[]" opposition of some member governments to .xxx ap-
proval. *See* Governmental Advisory Comm., *GAC Communiqué – San Francisco*, ICANN
(Mar. 18, 2011), https://gacweb.icann.org/download/attachments/1540152/GAC_40_San_
Francisco_Communique.pdf. The communiqué further noted "concerns expressed by experts"
that actions by those governments to block the .xxx TLD could pose "a potential risk/threat to
the universal resolvability and stability of the DNS," as well as concerns that the .xxx registry
operator's commitments to police the domain could move ICANN in the direction of "an on-
going management and oversight role regarding Internet content." The ICANN Board, finding
in light of the arbitration decision that the domain application had met all relevant require-
ments, dismissed those concerns as inconsequential. *18 March 2011 Draft Rationale for
Approving Registry Agreement with ICM's .XXX sTLD*, ICANN (Mar. 18, 2011), *available at*
http://www.icann.org/en/minutes/draft-icm-rationale-18mar11-en.pdf.

80.   *See* MUELLER, *supra* note 31, at 72–73 (stating that U.S. officials requested GAC
chair Tarmizi to send a letter expressing member governments' discomfort with .xxx, because
the U.S. saw GAC pressure on the ICANN Board as less politically damaging than unilateral
U.S. pressure); The Berkman Centr. for Internet & Soc'y, *supra* note 70, at 104–05.

GAC Principles contemplated a powerful governmental role in the process of adding new gTLDs: it would have given any GAC member an effective veto over any proposed gTLD name.[81] The completed version of the Principles, in 2007, eliminated that veto, but it incorporated other directions covering the gamut of domain name policymaking concerns. gTLD names, they enjoined, should respect human rights, human dignity, and equality. They should not infringe "sensitivities regarding terms with national, cultural, geographic and religious significance." ICANN should avoid geographical names or descriptions of geographical languages or peoples, except with the permission of the relevant governments. There must be a procedure for blocking, "at no cost and on demand of governments," individuals or firms from registering any second-level "names with national or geographical significance" within the domain.[82]

The GAC began to express its views more actively in areas other than those involving ccTLDs and new gTLDs. It intensified its involvement with WHOIS policy[83] and internationalized domain names.[84] It worked to im-

---

81.   *See Draft GAC Guidelines on gTLDs*, ICANN (Oct. 17, 2010), *available at* http://forum.icann.org/lists/gtld-council/msg00307.html ("If the GAC or individual GAC members express formal concerns about a specific new gTLD application, ICANN should defer from proceeding with the said application until GAC concerns have been addressed to the GAC's or the respective government's satisfaction."); *see also* Mueller, *supra* note 31, at 202–03. The same document directed ICANN to bar any top-level domain name that "promote[d] hatred, racism, discrimination of any sort, criminal activity or any abuse of specific religions or cultures"; barred top-level domain names of "cultural" or "religious" significance unless the domain were sponsored by a "clear and legitimate candidate" and there were no "major objections from the community concerned"; and barred any top-level domain names identical to geographic names, absent the approval of the relevant national government. *Draft GAC Guidelines* at §§ 2.1, 2.6, 2.12.

82.   *See GAC Principles Regarding New gTLDs*, ICANN (Mar. 28, 2007), *available at* http://gac.icann.org/system/files/gTLD_principles_0.pdf. A "second-level domain name" is the dot-delimited text string immediately to the left of the top-level name—such as "wayne" in www.wayne.edu.

83.   *See GAC Principles Regarding gTLD WHOIS Services,* ICANN (Mar. 28, 2007), *available at* https://gacweb.icann.org/download/attachments/1540132/WHOIS_principles.pdf; Governmental Advisory Comm., *GAC Communiqué – Los Angeles*, ICANN (Oct. 31, 2007), https://gacweb.icann.org/download/attachments/1540191/GAC_30_Los_Angeles_Communique. pdf?version=1&modificationDate=1312228082000; Governmental Advisory Comm., *GAC Communiqué – Lisbon*, ICANN (Mar. 28, 2007), https://gacweb.icann.org/download/ attachments/1540189/GAC_28_Lisbon_Communique.pdf?version=1&modificationDate= 1312228620000; Governmental Advisory Comm., *GAC Communiqué – Marrakech*, ICANN (June 28, 2006), https://gacweb.icann.org/download/attachments/1540176/GAC_26_Marrakech_ Communique.pdf?version=1&modificationDate=1312228846000; Milton Mueller & Mawaki Chango, *Disrupting Global Governance: The Internet WHOIS Service, ICANN, and Privacy*, 5 J. Info. Tech. & Pol. 303, 319–20 (2008).

WHOIS presented a tricky issue. While governments supported law enforcement access to the relevant information, some WHOIS requirements were inconsistent with European privacy laws. *See ICANN Procedure for Handling WHOIS Conflicts with Privacy Law*, ICANN (Jan. 17, 2008), http://www.icann.org/en/processes/icann-procedure-17jan08.htm.

84.   *See supra* text accompanying note 30; *see*, *e.g.*, Governmental Advisory Comm., *GAC Communiqué – Nairobi*, ICANN (Mar. 10 2010), http://nbo.icann.org/meetings/

prove its working methods, and to become better integrated into ICANN policy development, so that it could operate proactively rather than reactively.[85] It announced a plan for a more robust secretariat to enable it to work better outside of its thrice-annual meetings.[86]

Most importantly, the GAC became much more closely involved with ICANN's ongoing effort to define permissible top-level domain names going forward.[87] It addressed narrow concerns—pushing for the exclusion from the generic top-level domain name space of anything that could be seen as representing a geographical name[88]—but also broader ones, playing a crucial role in ICANN's more general rethinking of how best to avoid controversial gTLD names.[89] In 2009, the GAC began expressing a newfound skepticism about whether new gTLDs were desirable at all;[90] in 2010, it

nairobi2010/presentation-gac-soac-reports-12mar10-en.pdf; Governmental Advisory Comm., *GAC Communiqué – Sydney*, ICANN (June 24, 2009), http://www.umic.pt/images/stories/ Sydney%20communique%20vFINAL.pdf; Governmental Advisory Comm., *GAC Communiqué – Mexico City*, ICANN (Mar. 4, 2009), https://gacweb.icann.org/download/attachments/ 1540151/GAC_34_Mexico_City_Communique_English.pdf?version=1&modificationDate=1 311372132000; Governmental Advisory Comm., *GAC Communiqué – New Delhi*, ICANN (Feb. 13, 2008), https://gacweb.icann.org/download/attachments/1540190/GAC_31_ New_Delhi_Communique.pdf?version=1&modificationDate=1312227981000; Governmental Advisory Comm., *GAC Communiqué – San Juan*, ICANN (June 28, 2007), https://gacweb. icann.org/download/attachments/1540188/GAC_29_San_Juan.pdf?version=1&modification Date=1312228402000.

    85.   *See* Governmental Advisory Comm., *GAC Communiqué – Marrakech*, ICANN, 5–10 (June 28, 2006), https://gacweb.icann.org/download/attachments/1540176/GAC_26_ Marrakech_Communique.pdf?version=1&modificationDate=1312228846000.

    86.   *See ICANN/GAC Secretariat Hybrid Model Set Up*, ICANN (June 19, 2010), http://brussels38.icann.org/meetings/brussels2010/presentation-gac-hybrid-models-19jun10- en.pdf; Maria Farrell, *Internet's Government Advisory Committee is Raising Its Game*, MARIA FARRELL (Mar. 11, 2010, 3:45 PM), http://mariafarrell.com/?p=65#more-65.

    87.   *See, e.g.*, Governmental Advisory Comm., *GAC Communiqué – Los Angeles*, ICANN (Oct. 31, 2007), https://gacweb.icann.org/download/attachments/1540191/GAC_ 30_Los_Angeles_Communique.pdf; Governmental Advisory Comm., *GAC Communiqué – Paris*, ICANN (June 26, 2008), https://gacweb.icann.org/download/attachments/ 1540187/GAC_32_Paris_Communique.pdf; Governmental Advisory Comm., *GAC Communiqué – Sydney*, ICANN (June 24, 2009), https://gacweb.icann.org/download/attachments/ 1540154/GAC_35_Sydney_Communique.pdf.

    88.   *See, e.g.*, Janis Karklins, Governmental Advisory Comm. Chairman, *Re: GAC Comments on New gTLDs and DAG v3*, ICANN (Mar. 10, 2010), http://www.icann.org/ en/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf.

    89.   *See* Milton Mueller, *ICANN and GAC discuss censorship*, INFO. POL'Y (June 25, 2010), http://www.i-policy.org/2010/06/icann-and-gac-discuss-censorship.html; Monika Ermert, *More Delay to ICANN Introduction of New Internet Domains?*, INTELL. PROP. WATCH (June 23, 2010, 7:49 PM), http://www.ip-watch.org/weblog/2010/06/23/more-delay-to-icann- introduction-of-new-internet-domains.

    90.   *See* Letter from Janis Karklins, Governmental Advisory Comm. Chairman, to Peter Dengate Thrush, ICANN Board Chairman (Aug. 18, 2009), *available at* http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf. There is an "urgent need," the GAC continued, "for economic studies to be concluded which assess whether the benefits of new gTLDs are likely to outweigh . . . costs." Governmental Advisory Comm., *GAC Communiqué – Nairobi*, ICANN, 8 (Mar. 20, 2010), https://gacweb.icann.org/

began lobbying for new mechanisms privileging the rights of trademark owners in the context of any new TLD rollout.[91] It was clear by 2010 that the GAC had become much more openly involved in policy discussions and had come to demand a much more important role in the ICANN process.[92]

The GAC's internal functioning is still a mystery to outsiders—it is typically unclear how members' views are aggregated in constructing GAC policy positions. Its initiatives seem to be driven by a relatively small number of actors.[93] The United States, Canada, and the EU are said to be the GAC's leading players; the rise of the GAC may thus represent no more than a shift from authority centered on the United States to authority shared within an Atlantic alliance. Indeed, some suggest that "the US calls the shots in GAC" and that other governments, including the EU, can do no more than make "minor modifications to U.S. initiatives."[94] But the GAC has shown itself recently to be both effective and influential.

I should note here ICANN's and the U.S. government's execution in September 2009 of a document they called an "Affirmation of Commitments."[95] With that document, the U.S. government and ICANN ended a set of contractual obligations running between them since 1998; the U.S. gave up what amounted to a contractual right to assign the ICANN function to some other entity. The Affirmation, for the most part, is a symbolic document,[96] but it does expand the role of the GAC in one important way: it

---

download/attachments/1540146/GAC_37_Nairobi_Communique.pdf?version=1& modificationDate=1312226773000.

91.   *See* Kevin Murphy, *Trademarks May Delay New TLD Approval*, DOMAIN INCITE (Dec. 8, 2010), http://www.domainincite.com/trademarks-may-delay-new-tld-approval.

92.   *See, e.g.*, Governmental Advisory Comm., *GAC Communiqué – Mexico City*, ICANN, 13 (Dec. 22, 2008), https://gacweb.icann.org/download/attachments/1540151/ GAC_34_Mexico_City_Communique_English.pdf?version=1&modificationDate=131137213 2000 ("[W]hen it comes to public policy parameters that need to be incorporated into [ICANN] policymaking, the expertise and competence lies with the GAC.").

93.   *See* Milton Mueller, *Competition Policy Letters to ICANN Part of a US-EC "Plot*," INTERNET GOVERNANCE PROJECT (June 19, 2011, 5:11 AM), http://blog. internetgovernance.org/blog/_archives/2011/6/19/4841358.html; Jamal Shahin & Matthias Finger, *ICANN's GAC and the Global Governance of the Internet: The Role of the EU in Bringing "Government" Back to Internet Governance* 19 (Dec. 2, 2008), http://mir.epfl.ch/ webdav/site/mir/users/181931/public/wp0902.pdf; *see also* Kieran McCarthy, *EU Confirms High-Level Meeting with US Government Over ICANN*, .NXT (May 11, 2011), http://news.dot-nxt.com/2011/05/11/kroes-strickling-meeting (characterizing the GAC as "dominated by the US and EU representatives").

94.   Milton Mueller, *GAC Backs Off TLD Censorship a Bit. But Not Enough.*, INTERNET GOVERNANCE PROJECT (Feb. 24, 2011, 12:27 PM), http://blog.internetgovernance.org/ blog/_archives/2011/2/24/4757553.html.

95.   *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation For Assigned Names and Numbers*, ICANN (Sept. 30, 2009), http:// www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm.

96.   *See* Froomkin, *supra* note 4, at 190–207. The U.S. government retained its authority over changes to the root zone file, and one should not imagine that the Affirmation manifests a sharp change in the U.S.-ICANN relationship. As I will detail in the next section, the U.S. government has been assertive, post-Affirmation, in pressing its views on ICANN.

mandates periodic reviews of ICANN and its policies, and gives the GAC a lead role in constituting the review teams.[97]

All is not sweetness and light, though, for proponents of greater government influence in ICANN deliberations. The GAC's new assertion of authority and its flexing of muscle have outstripped the institutional forms in place to accommodate it. A recent internal review of ICANN processes described the relationship between the ICANN Board and the GAC as "dysfunctional."[98] I'll explain why in the next section.

III. THE GAC IN THE POLICY PROCESS

ICANN constituted an Accountability and Transparency Review Team (ATRT) in 2010, tasked with evaluating its mechanisms for public input, accountability, and transparency.[99] The ATRT saw much to improve in the relationship between ICANN's Board and the GAC. Some of the difficulties in that working relationship, it found, lie in the long period of time that sometimes must pass before the GAC can take a public position. For one thing, GAC members may need time-consuming consultations with their own national governments before negotiating with other GAC members. For another, the GAC itself meets only three times a year, and it is still developing its capacity to work between sessions.[100]

But the ATRT report concluded that the difficulties go far beyond the GAC's internal workings. The report focused on an ambiguity in ICANN's bylaws as to what constitutes GAC "advice" triggering the bylaws requirement that ICANN "try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."[101] GAC members had taken the position that any communication emanating from that body—a position paper, a letter from the chair, or a meeting communiqué summarizing member

---

See infra text accompanying notes 122–132; *see e.g.*, Letter from Lawrence Strickling, Assistant Sec'y for Communications and Info., Dep't of Commerce, to Rod Beckstrom, ICANN CEO (Dec. 2, 2010), *available at* http://forum.icann.org/lists/5gtld-guide/pdf3Ep9MhQVGQ.pdf.

97.   *See* MUELLER, *supra* note 31, at 249–50; Avri Doria, *Post JPA—tempered happiness*, RANDOM THOUGHTS (Sept. 30, 2009), http://avri.doria.org/post/201173236/post-jpa-tempered-happiness.

98.   *Final Recommendations of the Accountability and Transparency Review Team*, ICANN, 37 (Dec. 31, 2010), http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf [hereinafter, *ATRT Report*].

99.   The ATRT was part of the review mechanisms mandated by the Affirmation of Commitments.

100.   *See ATRT Report*, *supra* note 98, at 37; *see also* The Berkman Centr. for Internet & Soc'y, *supra* note 70, at 78–79. The Berkman Center report—which was generated as part of the ATRT process, and was attached as an exhibit to the ATRT report—thus notes the challenges posed by "disparate organizational culture, the challenges of aligning internal processes across multiple institutions, and complex cross-community communication mechanisms." The Berkman Centr. for Internet & Soc'y, *supra* note 70, at 46.

101.   *See ATRT Report*, *supra* note 98, at 3, 30–31, 35, 37. *See generally supra* text accompanying note 51 (discussing the ICANN bylaws).

views—constituted GAC "advice." ICANN Board members and staff, for their part, disputed the notion that they were presumptively bound by the views in GAC meeting communiqués, when the views noted in those communiqués might not represent consensus or formally adopted GAC positions, and indeed might not be internally consistent.[102]

Moreover, the report noted, ICANN lacks a formal process for responding to GAC advice during the pendency of the policy development process. The new generic top-level domain policy process involved a series of steps in which ICANN staff issued tentative or draft documents, solicited public comment, and then issued new iterations of the documents. The GAC provided comments, and found that while not all of its positions had been incorporated in full in the new drafts, neither had the Board or staff formally and explicitly rejected its views. This left GAC actors feeling as if they had not been sufficiently listened to, and feeling that they had no choice but simply to repeat their demands in the next round.[103]

This begins to get us to the nub of the problem relating to the timing and nature of GAC participation in the ICANN policy process. Neither

---

102.   See *ATRT Report*, *supra* note 98, at 33, 37 (finding that there has likely been confusion as to which GAC communications have triggered formal Board obligations). *See also* The Berkman Centr. for Internet & Soc'y, *supra* note 70, at 48 ("[L]ack of discernable boundaries for channels of communication [during the .xxx controversy] caused confusion when multiple GAC members submitted correspondence to the Board concurrently, often expressing conflicting views with prior advice or opinion.").

103.   *See ATRT Report*, *supra* note 98, at 34 ("GAC members expressed concern that the Board is not providing feedback to the GAC on the advice it does provide to the Board. One GAC member commented that the GAC regularly has to repeat its advice in subsequent communiqués because the Board does not supply any response to the GAC that it is taking the GAC advice into account in its decision making."); The Berkman Centr. for Internet & Soc'y, *supra* note 70, at 49 ("The lack of clear procedures for the timely acknowledgement of and response to the range of GAC inputs by the Board may impede the policy development process, as the GAC may feel compelled to restate its positions when it has not received a sufficient response.").

> In its October 2007 Communiqué, the GAC expressed concerns that the GNSO [(Generic Names Supporting Organization)] recommendations for new gTLDs did not "properly take into account" the GAC principles regarding the use of country names in new gTLDs. The GAC expressed this concern again in its June 2008, November 2008, March 2009, June 2009, October 2009 and March 2010 Communiqués, as well as in letters on April 24 and August 18, 2009.
>
> The second version of the DAG [(Draft Applicant Guidebook)], published on February 19, 2009, required "evidence of support, or non-objections from the relevant government or public authority" for applicants for geographic name-based gTLDs. In communications to the Board after the publication of this draft of the DAG, the GAC acknowledged that it was an improvement on the first version but that it did not yet fully represent the GAC's views. In response, representatives of the Internet Commerce Association demanded to know why ICANN had chosen the recommendations of the GAC over those of the GNSO, in which geographic names were given less protection.

The Berkman Ctr. for Internet & Soc'y, *supra* note 70, at 80–81 (footnotes omitted).

ICANN's initial bylaws,[104] nor their 2002 reworking, contemplated that the GAC would participate in "bottom-up" policy deliberations and argumentation. Instead, the GAC was to present its own advice directly to the Board.[105] This worked tolerably well so long as GAC involvement in ICANN policy-making was minor.

As we have seen, though, over time the GAC shifted its focus. No longer an uninvolved body concerned with only a very narrow band of issues seen as within its special jurisdiction, the GAC became aggressive, making broad arguments reflecting the views of private lobbies on a wide range of matters such as trademark protection. At the same time, the U.S. government (especially after the signing of the Affirmation of Commitments) channeled its own lobbying of ICANN into the GAC forum.

At that point the challenges of ICANN's structure became apparent. That structure did not provide for any interaction "inside" the ICANN policy process between the GAC and other interested parties—the registrars, say, or groups seeking to operate new top-level domains, or civil society groups. The GAC interacted with the Board and only with the Board.

The initial guiding principle of the ICANN policy process was that policy would be crafted in subsidiary fora, and presented to the Board for ratification only at the end of the process, when affected groups (not including the GAC) had already thrashed out a solution. GAC advice pertained to a consensus policy already presented to the Board, worked out and endorsed by the various non-GAC policy actors. If the GAC's view were negative, it would be seeking at the eleventh hour to squelch a proposal that had already acquired momentum and support.

The process included no way to resolve conflicts between the GAC and other participants, except through Board fiat. ICANN's Generic Names Supporting Organization (GNSO), which brings together the various constituencies that ICANN recognizes as having an interest in non-ccTLD domain names, provides a mechanism through which those participants can seek to work out their differences. But the GAC is not part of the GNSO process. The ICANN structure channels GAC participation into its privileged, separate route to the Board. If the Board declines to adopt the GAC's position, the GAC feels that it has not been granted proper respect and

---

    104.   *See Bylaws for Internet Corporation for Assigned Names and Numbers*, *supra* note 32, and accompanying text.

    105.   ICANN's 2002 rule changes rejected the earlier notion that the Board's only role was to ratify community consensus after a policymaking process that took place elsewhere; the organization recognized that consensus might not be possible on some issues, and the Board would have to decide those issues anyway. *See* David R. Johnson et al., *A Commentary on the ICANN "Blueprint" for Evolution and Reform,* 36 Loy. L. Rev. 1127, 1146 (2003). But the 2002 changes preserved—indeed embraced—the idea that in the typical situation, proposals reaching the Board would be the product of an extensive policy process, at lower levels of the organization, in which the various affected parties could work out their differences. And they contemplated that GAC involvement would take place only after that.

deference; if the Board does adopt its position, other participants feel unfair-
ly squelched.[106]

IV. Dancing with Elephants

These limitations became clear in the past couple of years in connection
with ICANN's plan to reshape the way in which it adds new gTLDs to the
domain name space. ICANN's most important job at its creation was to
develop policy for the expansion of the domain name space.[107] Some argued
that ICANN should immediately authorize hundreds of new top-level do-
main names; that approach, they urged, would best advance competition,
innovation, and cultural diversity, allowing users and firms to decide which
TLDs they chose to register in. Others argued for only the barest expan-
sion.[108] ICANN in its first decade dropped in a small, restricted number of
new top-level domains, after scrutinizing and approving each one from a
business, financial, technical, and operational perspective.[109]

ICANN began a policy process in 2006, though, that held the promise
of a much larger expansion of the domain name space.[110] Under the new
approach, ICANN wouldn't arbitrarily pick a few new gTLDs out of a large
pool of applications; rather, it would seek to establish objective criteria for
acceptable new gTLDs, and then grant all applications that met those crite-
ria. As the policy process moved along, it became clear that ICANN might
end up authorizing hundreds of new domains after all—a controversial
thing.

Starting in 2008, ICANN staff began collecting its procedural and sub-
stantive rules for the new gTLD-process-in-waiting in a document called the
"Draft Applicant Guidebook," or DAG.[111] The DAG went through seven
iterations, as part of a policy process spanning more than five years, involv-

---

106.   *See* The Berkman Ctr. for Internet & Soc'y, *supra* note 70, at 48.

107.   *See* Jonathan Weinberg, *ICANN, "Internet Stability," and the New Top Level Do-
mains*, *in* Communications Policy and Information Technology: Promises, Problems,
Prospects 3, 11 (Lorrie Faith Cranor & Shane Greenstein eds., MIT Press 2002).

108.   See the various arguments canvassed in *Interim Report of Working Group C of the
Domain Name Supporting Organization, Internet Corporation for Assigned Names and Num-
bers*, Generic Names Supporting Org. of ICANN (Oct. 23, 1999), http://www.dnso.org/
dnso/notes/19991023.NCwgc-report.html.

109.   From 1999 through 2010, ICANN approved a total of fourteen new gTLDs. *See
Top-Level Domains (gTLDs)*, ICANN (Aug. 13, 2010), http://www.icann.org/en/tlds/ (.aero,
.asia, .biz, .cat, .coop, .info, .jobs, .mobi, .museum, .name, .pro, .tel, .travel); *.POST Sponsored
TLD Agreement*, ICANN (Nov. 2, 2009), http://www.icann.org/en/tlds/agreements/post/
(.post). For the story of the first seven, see Weinberg, *supra* note 107, at 11–20.

110.   ICANN has been involved with the new-gTLDs issue for its entire existence, so
any starting date for this segment of the process is arbitrary. I am dating the process from
GNSO Initial Report: Introduction of New Generic Top-Level Domains, ICANN (Feb. 19,
2006), http://www.icann.org/en/topics/gnso-initial-rpt-new-gtlds-19feb06.pdf.

111.   *See New gTLD Program: Draft Applicant Guidebook (Draft RFP)*, ICANN (Oct.
24, 2008), http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf.

ing ICANN staff and subsidiary groups, on its way to ultimate Board approval in 2011. How was the GAC to involve itself in this process? It wouldn't be well served by absenting itself entirely during all the years in which the policy was being hammered out, and waiting for the result to be presented to the Board. And the GAC, indeed, filed comments on successive versions of the DAG.[112] But that badly fit the bylaws and earlier conceptions of the GAC role, which had the GAC interacting with the Board, not with ICANN staff. It was unclear just what ICANN was supposed to do when staff declined to incorporate a GAC recommendation in the DAG's latest iteration.

ICANN sought to bring the GAC into the policy process in 2010 by setting up a "Cross-Community Working Group" (CCWG) in which GAC members, GNSO representatives, and members of ICANN's At-Large Advisory Committee (nominally representing individual Internet users) could seek to work out a particular contested matter. But the approach didn't succeed, again because of ambiguity about the GAC's role in the process. To be sure, the CCWG reached agreement on a set of policy recommendations, and duly forwarded them to the Board.[113]

But the U.S. government, in particular, wasn't satisfied with the CCWG's resolution of the dispute. It floated a trial balloon urging the GAC to reject the CCWG's conclusion and to transmit formal advice demanding sweeping changes in the rules for authorization of new generic top-level domains.[114] Under the proposal the U.S. government floated, any GAC member would have been able to object to any gTLD name for any reason, and—unless some other GAC member sought to countermand the objection—the objection would have been binding on the Board. U.S. policymakers abandoned this proposal after criticism,[115] but only intensified their attempts—through the GAC—to exercise a veto at the very last stages of the process.

In the last few months before the Board's adoption of its new gTLD plan in June 2011, negotiations over the details of that plan gave a sense of

---

112. *See, e.g.*, Governmental Advisory Comm., *GAC Communiqué – Nairobi*, Annex B, ICANN, 7–9 (Mar. 10, 2010), nbo.icann.org/meetings/nairobi2010/presentation-gac-soac-reports-12mar10-en.pdf.

113. *See Report on Implementation of GNSO New GTLD Recommendation #6*, ICANN (Sept. 21, 2010), http://gnso.icann.org/issues/new-gtlds/report-rec6-cwg-21sep10-en.pdf; Milton Mueller, *Bye-bye, "Morality and Public Order,"* INTERNET GOVERNANCE PROJECT (Sept. 25, 2010, 9:02 AM), http://blog.internetgovernance.org/blog/_archives/2010/9/25/4639200.html.

114. *See USG Submission to the GAC Scorecard re New gTLDs*, INTERNET GOVERNANCE PROJECT, http://blog.internetgovernance.org/pdf/USGmonstrosity.pdf (last visited Oct. 6, 2011); Milton Mueller, *The US Commerce Dept position paper for the ICANN Board negotiations*, INTERNET GOVERNANCE PROJECT (Jan. 29, 2011, 1:11 AM), http://blog.internetgovernance.org/blog/_archives/2011/1/29/4737705.html. The GAC had already expressed opposition to the CCWG's answers at an ICANN meeting at the end of 2010.

115. *See* Mueller, *supra* note 94.

"all GAC, all the time." The March 2011 ICANN meeting was "completely dominated by GAC-Board negotiations" over new top-level domains.[116] ICANN and the GAC released continually-updated "scorecards" characterizing how far apart they were; the one ICANN drafted in advance of the meeting tracked fifty-four identified issues.[117] The negotiations continued after the meeting, and got more detailed. April 15 saw ICANN releasing a "Revised ICANN Notes on the GAC New gTLDs Scorecard" that tallied ICANN positions on eighty issues the GAC had raised. By that point, ICANN explained, it had narrowed the dispute to seventeen issues of substantive disagreement and eighteen more of differences regarding implementation, with three final questions marked "TBD."[118]

The ICANN Board approved .xxx as a top-level domain at the March 2011 meeting;[119] it thus made clear, had there been any doubt, that it was willing to brush past GAC concerns. In mid-April 2011, ICANN released a new version of its proposed rules for the new TLD rollout.[120] It was plain that its policy process was nearing an end, but its continuing discussions with the GAC weren't eliminating all areas of disagreement. On a variety of matters (Could top-level domain applicants modify their applications to meet GAC objections? Could domain-name "registries" own domain-name "registrars"? What sort of proof was necessary to trigger "uniform rapid suspension" of a domain name at the behest of a trademark owner, and what would be the consequences of a trademark holder's prevailing in such a proceeding? Under what circumstances could an entire new top level-domain be revoked because of trademark infringement?), ICANN was signaling its intention to proceed in the face of GAC disapproval.[121]

---

116.   Milton Mueller, *ICANN San Francisco: MuSH, GAC, MuSH!*, Internet Governance Project (Mar. 17, 2011, 5:25 PM), http://blog.internetgovernance.org/blog/_archives/2011/3/17/4773838.html.

117.   *See GAC Sorted Scorecard*, ICANN (Mar. 14, 2011), http://www.icann.org/en/topics/new-gtlds/gac-scorecard-sorted-14mar11-en.pdf.

118.   *Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response*, ICANN (Apr. 15, 2011), http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-redline-15apr11-en.pdf.

119.   *See supra* note 79 and accompanying text. Following that decision, the European Commissioner for the Digital Agenda, Neelie Kroes, went so far as to write to U.S. Secretary of Commerce Gary Locke urging him to countermand ICANN's action; she suggested that ICANN's disregard of national government objections in this context undermined "the legitimacy of the ICANN model." *See* Kevin Murphy, *Europe Asked the US to Delay .xxx*, Domain Incite (May 5, 2011), http://domainincite.com/europe-did-ask-the-us-to-delay-xxx. The U.S. government, however, declined to do so.

120.   *See gTLD Applicant Guidebook–April 2011 Discussion Draft*, ICANN (Apr. 15, 2011), http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf.

121.   ICANN, moreover, issued a warning about possible changes to the Board-GAC relationship. On the one hand, the discussion draft stated, ICANN would apply a "strong presumption" against approving a top-level domain application if the GAC transmitted advice labeled as "GAC consensus" recommending its rejection. The draft, however, continued: "ICANN's transparency requirements indicate that GAC Advice on New gTLDs should identify objecting countries, the public policy basis for the objection, and the process by

The U.S. government urged that ICANN not go forward with new gTLDs until its disagreements with the GAC were "resolved."[122] It warned that ICANN needed to tend to its "political sustainability," expressing concern that if foreign governments were not satisfied with ICANN's attentiveness and deference to their views as expressed in the GAC, they might withdraw their support for ICANN and favor transfer of its authority to an international forum such as the ITU.[123]

The "political sustainability" concern seemed rhetorical and not well founded. ICANN has consolidated its position in international and intergovernmental fora: the 2010 ITU Plenipotentiary Conference ended in an explicit recognition of ICANN's role.[124] While there has been some (unsuccessful) international pressure to transfer ICANN authority to the ITU, it has come from developing countries and Russia, which have little ability to set the agenda in the GAC.[125] The governments that are most influential in the GAC—which is to say, those that might be most angered by ICANN's rejection of GAC advice—are those of the United States and the EU, and those governments have consistently rejected endowing the ITU or any other

---

which consensus was reached." *Id.* at § 3.1; *see also New gTLD Program Explanatory Memorandum*, ICANN (Apr. 15, 2011), http://www.icann.org/en/topics/new-gtlds/gac-objections-sensitive-strings-15apr11-en.pdf. This direction, suggesting that ICANN would not defer to advice that did not meet its procedural standards, was a challenge to the traditional opacity of GAC advice, and to the ability of more influential GAC members to generate desired outcomes behind the group's closed doors.

122.   *See* Lawrence Strickling, *Global Internet Governance Conference at the American University School of International Service*, ELLUMINATE (May 5, 2011), https://sas.elluminate.com/p.jnlp?psid=2011-05-05.0606.M.12DFE0053934A528AAE4D38A76E4E0.vcr&sid=2009293 (at 3:46:55).

123.   Kieren McCarthy, *USG 'Tough Love' Policy Toward ICANN Revealed*, .NXT (June 25, 2011), http://news.dot-nxt.com/2011/06/25/strickling-board-meeting-cartagena; Kieren McCarthy, *USG to ICANN Board: Pull Your Head Out Your Ass*, .NXT (Mar. 15, 2011), http://news.dot-nxt.com/2011/03/14/usg-to-icann-board-head-out-of-ass; Milton Mueller, *@GigaNet: One Government's Opinion About Internet Governance*, INTERNET GOVERNANCE PROJECT (May 6, 2011, 2:04 PM), http://blog.internetgovernance.org/blog/_archives/2011/5/6/4811322.html; Milton Mueller, *Commerce Department: "Foreign Devils Made Us Do It,"* INTERNET GOVERNANCE PROJECT (Mar. 7, 2011, 11:12 AM), http://blog.internetgovernance.org/blog/_archives/2011/3/7/4765678.html; Mueller, *supra*, note 113.

124.   *See* Mueller, *Commerce Department: "Foreign Devils Made Us Do It," supra*, note 123; *see also* Kieren McCarthy, *Last-Minute Diplomacy Secures ITU's Internet Future*, GLOBAL INTERNET BUS. COALITION (Oct. 25, 2010), http://gibc.biz/2010/10/last-minute-diplomacy-secures-itu%E2%80%99s-internet-future.

125.   *See* Monika Ermert, *UN And Internet Governance, Next Four Years: Better Cooperation Or Bigger Role?*, INTELL. PROP. WATCH (Oct. 27, 2010), http://www.ip-watch.org/weblog/2010/10/27/un-and-internet-governance-next-four-years-better-cooperation-or-bigger-role; Eric Pfanner, *Regulating the Internet in a Multifaceted World*, N.Y. TIMES, June 26, 2011, http://www.nytimes.com/2011/06/27/technology/internet/27iht-internet27.html?_r=2&hpw.

intergovernmental organization with Internet governance power.[126] There is no reason to think that they will change that position.[127]

U.S. government officials also were not shy, in May 2011 discussions of the Board-GAC negotiations, to note that the United States had before it the decision whether to renew ICANN's status as the entity performing the Internet Assigned Numbers Authority (IANA) function.[128] The "IANA function" includes a miscellany of tasks, one of which involves approving changes in the root zone file that includes all Internet top-level domains. For historical reasons, these tasks are carved off from ICANN's other activities, and are performed by ICANN pursuant to a free-standing contract with the U.S. government. That contract was due to expire on September 30, 2011; ICANN wanted to see it extended on favorable terms.[129] The unspoken linkage was plain.

The U.S. government, indeed, on June 9 issued a Notice of Inquiry proposing to use the IANA contract as a vehicle for a demand that ICANN approve no new gTLDs without demonstrating that each new domain had "received consensus support from relevant stakeholders and is supported by the global public interest."[130] The proposal blithely ignored the fact that IANA activities since 1999 have been entirely ministerial when it came to gTLDs. It incorporated policy choices ICANN had rejected in preparing the new gTLD program: the Applicant Guidebook's requirements for approval of new TLDs required neither that applicants be able to show "consensus support" nor that they make a specific showing that the domains advance the global public interest.[131] And in relying on the IANA contract as a means for unilateral United States control over naming policy, the U.S. government ignored the multilateralism that is its official policy in this arena.[132]

---

126.   *See* Ermert, *supra* note 125.

127.   *See Communiqué on Principles for Internet Policy-Making*, OECD, 4 (June 28–29, 2011), http://www.oecd.org/dataoecd/40/21/48289796.pdf (urging support for the existing multi-stakeholder approach for Internet naming and numbering).

128.   *See, e.g.*, Strickling, *supra* note 122.

129.   *See* Froomkin, *supra* note 4, at 192 n.15, 206–07.

130.   Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 34,658, 34,665 (Dep't of Commerce June 14, 2011), *available at* http://www.ntia.doc.gov/frnotices/2011/FR_IANA_FurtherNOI_06102011.pdf.

131.   *See* Milton Mueller, *NTIA's IANA Notice Contains Hidden Joke. Or Something.*, Internet Governance Project (June 13, 2011, 12:25 PM), http://blog.internetgovernance.org/blog/_archives/2011/6/13/4837428.html; Kevin Murphy, *US Resurrects the Controversial New TLDs Veto*, Domain Incite (June 11, 2011), http://domainincite.com/us-revives-the-gac-new-tlds-veto. The Guidebook does require applicants to show support from self-defined communities and to provide information on the domain's expected benefits. See *May 2011 New gTLD Applicant Guidebook*, ICANN http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm (last visited Oct. 7, 2011).

132.   The IANA process is still ongoing. In the meantime, the U.S. government has extended the existing IANA contract to March 31, 2012. It seems unlikely, though, that this bid will survive. It is too strongly in tension with the U.S. commitment to multilateralism reflected in documents including the Affirmation of Commitments.

After a last-minute flurry of letters,[133] the ICANN Board approved the new gTLD program on June 20, 2011. [134] It noted a variety of points where it had rejected GAC positions.[135] European Commission official Neelie Kroes responded by explaining that ICANN's "disregard [of] governmental advice" pointed to "deficiencies in the current functioning of the model," and called for "specific actions in order to remedy the situation."[136]

V. WHITHER THE GAC?

Even before the final stages of 2011's gTLD policy process, it was clear that ICANN faced a structural problem: the GAC cannot both assume a fully engaged role in the policy negotiation process and simultaneously have the power of a presumptive veto at the end of the process. Other players in the ICANN space will not be eager to negotiate, on an operational level, with an entity that asserts its right later on to repudiate those negotiations from a privileged position.

The GAC and ICANN thus face two key questions. The first relates to the degree of influence the GAC will be able to exert in the ICANN policy development process. In how broad a class of cases can the GAC, simply by virtue of its opposition, block or reverse a policy resolution that would otherwise have sufficient support to prevail in the multiplayer ICANN policy process?

---

133.   *See* Letter from Lawrence E. Strickling to Peter Dengate Thrush, ICANN Board Chairman (June 16, 2011), *available at* http://www.icann.org/en/correspondence/strickling-to-dengate-thrush-16jun11-en.pdf (forwarding a letter from James Tierney, U.S. Dep't of Justice Chief); Letter from Gerard de Graaf, Dir. European Comm'n, and Linsey McCallum, Acting Dir. European Comm'n, to Rod Beckstrom, ICANN CEO, and Peter Dengate Thrush, ICANN Board Chairman (June 17, 2011), *available at* http://www.icann.org/en/correspondence/eu-to-icann-17jun11-en.pdf.

134.   ICANN had issued another draft of the Applicant Guidebook on May 30. *See May 2011 New gTLD Applicant Guidebook*, supra note 131. That draft had gone further to meet GAC objections while still falling short of GAC proposals in several key areas, including: the documentation for GAC consensus advice; a variety of issues relating to the rights to be given trademark holders vis-à-vis domain name registrants and would-be registrants; and the question of registry-registrar cross-ownership. *See* Governmental Advisory Comm., *GAC comments on the Applicant Guidebook (April 15th, 2011 version)*, ICANN (May 26, 2011), http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf.

135.   *See Approved Board Resolutions*, ICANN (June 20, 2011), http://www.icann.org/en/minutes/resolutions-20jun11-en.htm; *Rationale: Remaining Areas of Difference Between ICANN's Board and Governmental Advisory Committee Regarding Implementation of the New gTLD Program,* ICANN (June 20, 2011), http://www.icann.org/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf.

The ICANN Board backed down on the prerequisites for GAC consensus advice. *See supra* note 121. It explained that "[f]urther discussions are needed . . . to find a mutually agreed [upon] and understandable formulation for the communication of actionable GAC consensus advice regarding proposed new gTLD strings." *Id.*

136.   *See* Monika Ermert, *EU's Kroes Not Amused By ICANN Decision on New TLDs*, INTELL. PROP. WATCH (June 22, 2011), http://www.ip-watch.org/weblog/2011/06/22/eus-kroes-not-amused-by-icann-decision-on-tlds.

The second relates to how institutional design channels that influence. If the GAC is to engage early in the process like any other policy participant, it must accept that its views will not always prevail. If it is to assert a presumptive veto late in the process, advising the Board directly, then it has the political disadvantage of opposing a policy resolution that has already gained momentum and support, and of seeking to introduce more delay into a process that could otherwise be completed more quickly. The GAC would like to exercise strong authority on both of those levels, but that does not seem workable or sustainable. It will not have credibility as a participant in the ordinary policy process unless it demonstrates willingness to accept the results of that process. And it does not appear at this point to have the leverage it would need to overpower a Board determined to assert its independence.

The United States has strongly advocated a "multistakeholder" model for ICANN, dating back to the WSIS negotiations, based on the idea that governments, industry representatives, and civil society representatives should all participate together in the Internet naming and numbering discourse.[137] But the idea of multistakeholderism, without more, says nothing about how disputes between the various actors should be resolved.

ICANN's current instantiation of the multistakeholder approach seems to be that it develops policy through a somewhat-structured bottom-up process described in its bylaws, and then the GAC brings as much political influence to bear as it can, in order to change those aspects of ICANN's plans that American and European governments, and their most influential business lobbies, are dissatisfied with. That process worked in the recent gTLD policy process, in the sense that the GAC was pretty successful in pushing ICANN policy outcomes in its preferred direction. But there are limits to how successful the approach can be: notwithstanding the pendency of the IANA contract, the United States and other GAC nations have only limited levers of power over ICANN. ICANN is now institutionally well established. Moreover, the integrity and coherence of ICANN's processes depend on the Board's respecting the results of GNSO negotiation.

Multistakeholderism differs from the conventional ICANN policy process in important ways. ICANN's conventional policy process is an awkward mash-up of a representation-based system, in which representatives of various industry groupings vote in a variety of subsidiary bodies,[138] and an administrative-agency-modeled system, in which agency staffers consider input from interested parties in making their own policy decisions.[139] The current multistakeholder process is less structured: it involves the provision of a forum in which an entity representing world governments

---

137.   *See supra* notes 60–67 and accompanying text.
138.   *See Generic Names Supporting Organization*, ICANN, http://gnso.icann.org/council/members.html (last visited Oct. 7, 2011) (describing the Council of the Generic Names Supporting Organization).
139.   *See* Weinberg, *supra* note 50, at 15–16.

can engage in free-form negotiations with the ICANN Board and staff, with the goal of winning all those policy concessions it turns out to have the political throw-weight to extract.

It has always been the case at ICANN that pressure by those with influence and power gets results.[140] To a significant extent, ICANN processes have tended to locate power in the set of folks privileged to sit at the policy-making table; its discussion mechanisms have also tended to privilege some participants over others.[141] In that respect, ICANN policy processes bring to mind what I have called a "bargaining" model of governance, in which policy-making is accomplished largely through negotiation based on relative bargaining power and appeals to shared values.[142] That model has virtues but also key disadvantages—it falls short when it comes to transparency, rules that can constrain policy wielders to serve public rather than private values, and processes that ensure that all voices are heard.[143]

Long-time ICANN watchers, who remember ICANN's 2000 selection of new gTLDs[144] or its 2001 negotiation of new gTLD contracts,[145] are familiar with just that lack of transparency and rule-boundedness. Civil society participants have pushed back against ICANN's insider nature, though, and ICANN has made progress on the transparency front.[146] ICANN has self-consciously (though with mixed success) addressed itself to the question of how best to avoid "capture," structuring its policy process so that it is more than simply a raw battle over which side has more political pull at a given moment.[147]

The GAC "multistakeholder" process, by contrast, follows a pure version of the bargaining model: GAC-Board interactions are little more than the exercise of political influence to the extent of the political actors' bargaining power. It is plain why the United States government likes the multistakeholder model; it thinks it can get what it needs under those

---

140.   *See* Jonathan Weinberg, *Geeks and Greeks*, 3 Info. 313, 328 (2001).

141.   *See id.*; Weinberg, *supra* note 50, at 15 ("ICANN had emphasized negotiation among stakeholders—representatives of government and industry groups deemed sufficiently important players to get a seat at the bargaining table. It initially identified agreement among these groups as the 'consensus' it was created to identify and implement."); *see also* Jochen von Bernstorff, *Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony*, 9 Eur. L.J. 511, 514 (2003).

142.   *See* Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 Buff. L. Rev. 615, 623–25 (1991).

143.   *See id.* at 730–31.

144.   *See* Weinberg, *supra* note 107, at 3.

145.   *See* Weinberg, *supra* note 140, at 322–25.

146.   *See* The Berkman Centr. for Internet & Soc'y at Harvard Univ., *supra* note 70, at 10 ("In recent years, ICANN has taken important actions . . . to improve its accountability and transparency . . . ."); *id.* at 2 (stating that while ICANN has made "significant progress in improving its public participation mechanisms," transparency "deficits" persist).

147.   *See Draft Implementation Plan for Improving Institutional Confidence*, ICANN (Feb. 26, 2009), *available at* http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf.

informal processes because it has sufficient influence to do so. From the perspective of coherent regulatory forms, though, that does not seem like an improvement.

CONCLUSION

ICANN was born out of a self-contradictory attempt to "privatize" the domain name system (DNS); its relationship with national governments has been fraught ever since. The GAC's recent assertion of a more powerful role in ICANN has exposed a fundamental incoherence in the ICANN structure: governments neither are part of the ICANN policy process nor can they work effectively outside of it. This has resulted in a "dysfunctional"[148] Board-GAC relationship, and recently led to saber-rattling and uncomfortable decision-making. Moreover, there is no straightforward way to fix the problem.

This story speaks to both the limitations and the power of formal structures for involvement in ICANN's (and other entities') decision-making process. On the one hand, governmental influence in the ICANN process has long been defined less by the "law on the books" of formal relationships than by the "law on the ground" created by the potential for varying degrees of influence between governmental and nongovernmental actors. Governments have influence; they have always been able to express views to ICANN outside of any formal process; and ICANN's key task has always been—as one of its early CEOs put it—to "work from within the system to balance competing interests."[149] Just as U.S. administrative agencies operate within a multi-institutional political environment, seeking to navigate among the various actors wielding power in that environment, so does ICANN negotiate with the wielders of power in its own environment.

At the same time—as in the administrative agency context—institutional design matters. Institutional design mediates power relationships in a political environment without dictating those relationships. The challenge facing ICANN relates not only to the degree of power governments can exert in its processes, but even more importantly to the institutional procedures and mechanisms within which that power is to be exercised.

---

148.   *See ATRT Report*, *supra* note 98, at 36.

149.   Mike Roberts, *Comments on the Civil Society Statement*, COMPUTER PROFESSIONALS FOR SOC. RESP. (July 30, 2000), http://cpsr.org/prevsite/internetdemocracy/Statement_July-13_Comments.html, *quoted in* Weinberg, *supra* note 140, at 328.