

# **Governments and Country Names: ICANN's Transformation into an Intergovernmental Regime.**

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Nominally, the Internet Corporation for Assigned Names and Numbers (ICANN) is a private corporation. The founding document of ICANN, a U.S. Commerce Department White Paper, stated that “neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses.”<sup>1</sup> Both the White Paper and the corporation’s bylaws explicitly prohibit government officials from sitting on the Board.

Many observers, especially in Europe, have questioned the validity of the US-promoted private sector approach. Some believe that national governments and their treaty organizations should be involved in “governing the Internet” and view the leverage of Internet names and addresses as an appropriate tool for doing so. Another view may not particularly favor government intervention, but nevertheless holds that it is inevitable that governments will become more deeply involved in anything as important and politically sensitive as domain names and Internet addressing.

This paper suggests that, sadly, the latter view is correct. It describes the growing incursion of governments into ICANN’s policymaking process, and the decline in ICANN’s original status as a bottom-up method of forming a policy consensus among the Internet community. One of the key areas leading to governmental interest and influence is the issue of who has the right to register domain names that reflect the names of countries. Governments have used ICANN to assert sweeping new global

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<sup>1</sup> Department of Commerce, NTIA, “Management of Internet Names and Addresses,” Statement of Policy, Federal Register 63, No. 111 (June 10, 1998) 31741.

rights to how their names are used in cyberspace – rights that have no basis in current treaties or international law. ICANN's management, due to the organization's weak legitimacy, is acceding to these claims.

## **Historical Background: Why ICANN became a private corporation**

ICANN's private-sector status resulted from several years of struggle between the technologists organized around the Internet Society, the US government, a few key national governments, and international treaty organizations, notably the European Commission, the World Intellectual Property Organization (WIPO) and the International Telecommunication Union (ITU). The technologists were centered in the United States, but their community was international in scope and did not perceive itself as part of or in any way beholden to the US government (notwithstanding their receipt of federal subsidies for many years). These individuals wanted very badly to keep control of the Internet's name and address spaces in the hands of technologist groups and to shield it from external political influences. More specifically, they wanted to give formal, legal control of Internet governance to informal organizations like the Internet Assigned Numbers Authority (IANA) and the Internet Architecture Board (IAB) that they had created while the Internet was being built in the late 1980s and early 1990s.

In early 1997, some of the leaders of these technical groups entered into a political alliance with WIPO, the ITU, and the International Trademark Association in an attempt to create a new, international domain name governance authority. These efforts took place without the approval or formal participation of the US government. The new authority was called the "generic top-level domain memorandum of understanding" (gTLD-MoU). The gTLD-MoU billed itself as "privatization" and "self-governance by the Internet community," but the strong presence of international treaty organizations, especially the ITU, belied that claim. Nor could it escape the notice of the US Government, which has a longstanding suspicion of the ITU. The US made it clear to the Internet technical community and the ITU that it would not agree to transfer control of the DNS root to the gTLD-MoU, and instead opened up a

proceeding under the Department of Commerce National Telecommunication and Information Administration.<sup>2</sup>

The ultimate product of the US government proceeding was the Department of Commerce “White Paper” issued in June 1998.<sup>3</sup> The complete story of this process is told in detail in my forthcoming book *Ruling the Root: Internet Governance and the Taming of Cyberspace* (MIT Press, 2002). As noted before, the White Paper proposed to privatize Internet administration and tried to limit the role of governments, even the US government, in the new organization. Instead of creating a new corporation and defining the policies and rules it should follow, it asked the Internet community to come together around a new private sector organization, to which it would delegate control of the DNS and the Internet addressing system after a two-year trial period. ICANN was organized by Jon Postel (the veteran Internet guru who had managed names and addresses for DARPA since its inception) and his lawyer Joe Sims in response to this call. It was organized under the laws of the State of California as a non-profit public benefit corporation.

Ira Magaziner, the White House policy advisor who presided over the White Paper process, presented it to the public as an epochal change in the nature of international organization. Drawing on a distinction between “industrial society” and “information society” that was popular at the time, Magaziner suggested that the White Paper’s methods were more appropriate to the information age. “We believe that the Internet as it develops needs to have a different type of coordination structure than has been typical for international institutions in the industrial age. [G]overnmental processes and inter-governmental processes by definition work too slowly and somewhat too bureaucratically for the pace and flexibility of this new information age.”<sup>4</sup> Not only was ICANN conceived as a private sector organization,

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<sup>2</sup> US Department of Commerce, NTIA, “Request for Comments on the Registration and Administration of Internet Domain Names,” July 1, 1997.

<http://www.ntia.doc.gov/ntiahome/domainname/dn5notic.htm>

<sup>3</sup> White Paper, note 1 above.

<sup>4</sup> Ira Magaziner, introductory comments at the first International Forum on the White Paper Reston, Virginia meeting, July 1, 1998.

but its purpose was allegedly confined to technical coordination rather than policy making or “Internet governance.”

## **ICANN’s Structure**

Official policy making in ICANN’s structure is supposed to follow a “bottom up” direction. (Figure 1) Policy making starts in one of three Supporting Organizations. One is devoted to protocols, another to addresses, and the third to domain names. As a matter of fact, domain name issues take up almost all of ICANN’s time and account for 90 percent of its budget. According to the Corporation’s bylaws, Supporting Organizations shall have “the primary responsibility for developing and recommending substantive policies regarding those matters falling within their specific responsibilities.”<sup>5</sup> Any proposal for a “substantive policy” that is “not received from a Supporting Organization” is, according to the bylaws, supposed to be referred to the relevant Supporting Organization “for initial consideration and recommendation to the Board.”

Thus, all substantive domain name policies are supposed to originate in the Domain Name Supporting Organization (DNSO). The DNSO is a corporatist council composed of 7 constituencies representing different interest groups in domain names.<sup>6</sup> Thus, if a government proposed policies to ICANN concerning domain names, according to the procedure contemplated in ICANN’s bylaws, those proposals should be forwarded to the DNSO for initial consideration and possible recommendation to the Board.

## **The Governmental Advisory Committee**

In order to gain support and legitimacy for its plan to privatize the domain name system, the United States had to make concessions to foreign interests. Foreign governments were concerned about the US lead in Internet commerce and feared that privatization of the domain name system in the hands of a US-based private corporation would enhance US dominance. In response to demands from the

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<sup>5</sup> ICANN bylaws, Article VI, Section 2b.

<sup>6</sup> The 7 constituencies are: Business and Commercial interests, Internet Service Providers, Trademark holders, Country code top-level domain registries, Noncommercial domain name holders, Registrars, and gTLD Registries.

European Commission and some national governments, the White Paper made it possible for governments to participate in ICANN in a “non-voting, advisory capacity.”<sup>7</sup> That concession led to the recognition by ICANN of a Governmental Advisory Committee (GAC) as a permanent part of its structure. The GAC was constituted March 2, 1999, with Australia’s Paul Twomey as its chair.<sup>8</sup> It should be noted that the GAC was not conceived as a Supporting Organization; it was intended to be only a point of communication between governments and ICANN.

The Americans who dominated ICANN’s management and interim Board initially viewed GAC as a prophylactic that did as much to keep governments out of ICANN’s affairs as it did to bring them in. The GAC, however, quickly became an important player in ICANN’s policymaking processes. At this point it is functioning as a fourth Supporting Organization in all respects except for the election of Board members.

From its inception, the GAC has focused on country code top-level domains – the two-letter domains based on the ISO-3166-1 standard – and on other country names and codes in the Domain Name System.

In the US Government’s final comment period on the ICANN proposal in October 1998, Australia’s Senator and Communications Minister Richard Alston expressed concerns about “the authority of national governments to manage or establish policy

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<sup>7</sup> “...the Commission is seeking a clear role for the international organizations such as WIPO and ITU in international communications policy. The internet is not an exception. We regard the statement in the White Paper as a minimum role, which should be implemented in the Bylaws of the new organization. I notice that the current draft Bylaws include a provision for Advisory Councils, and there may be a solution to be found in that context.’ C. Wilkinson, European Commission ‘Internet governance – implementation of the US white paper’, Internet DNS Summit, Geneva, 24 July 1998.

<sup>8</sup> Leadership of the GAC came primarily from representatives of governments and intergovernmental organizations activated either by the gTLD-MoU or by the US Green Paper: Paul Twomey of Australia, Robert Shaw of the ITU, Christopher Wilkinson of the EC, and Francis Gurry of WIPO. The initial list of names inviting governments to send representatives to meetings was drawn from the ITU.

for their own ccTLDs.”<sup>9</sup> In her 20 October letter to the interim Board designees, Commerce Department official J. Beckwith Burr asked ICANN to provide assurances about their intentions regarding ccTLD management.<sup>10</sup> ICANN’s response confirmed that governments would have such authority but cautioned that the “details of implementation ...may be complex” and implied that it would look to guidance from the GAC on that question.<sup>11</sup>

Henceforward GAC’s leading participants mounted a persistent campaign to redefine the legal delegation procedure and practical relationship between ICANN, governments and country code top-level domain (ccTLD) administrators. The changes were designed to give national governments direct control over ccTLD delegation and re-delegation decisions. The GAC also fought to make name space references to countries exclusive and grounded in the existing political order. It demanded, for example, that ICANN abstain from assigning any top-level domain names that referred to countries, regions, languages and peoples without the approval of the relevant government or public authority. This would rule out, for example, top-level domains for internal nationalities such as .TIBET, .WALES, and .KASHMIR, and presumably for regions such as .ASIA.

A series of communiqués issued throughout 1999 affirmed the GAC’s concerns about gaining control of country code delegations.<sup>12</sup> In February 2000, GAC released a detailed document describing what it hoped would become the model for

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<sup>9</sup> Letter of Senator Richard Alston to William Daley, Secretary of Commerce, 8 October 1998.

<sup>10</sup> Letter of J. Beckwith Burr, U.S. Commerce Department NTIA to ICANN interim Board, October 20, 1998.

<sup>11</sup> Esther Dyson, ICANN Board Chair to Burr, 6 November 1998.

<sup>12</sup> At the Berlin meeting of ICANN in May 1999, the GAC communiqué asked ICANN to reassign “with the utmost promptness” ccTLD delegations of “external and dependent territories” upon request of the “relevant public authority or government.” (GAC Communiqué, 25 May, 1999) “The GAC also reaffirmed that the delegation of a ccTLD Registry is subject to the ultimate authority of the relevant public authority or government.” (GAC communiqué 24 August, 1999)

institutionalizing the relationship between ICANN, ccTLD delegations, and the relevant national governments or public authorities.<sup>13</sup>

## **New TLDs and Rights to Names of Countries and Other Geopolitical Designators**

As ICANN has matured, its management, which is basically controlled by the Jones, Day, Reavis and Pogue law firm, has become increasingly impatient with the bottom up supporting organization process proposed by Jon Postel (who died in October 1998, just as ICANN was getting off the ground). ICANN's management has done everything in its power to bypass the Domain Name Supporting Organization, or to marginalize it when it cannot be ignored completely. It has also delayed and resisted the creation of a membership structure that would elect the At-Large Board members.

Governments and international organizations are eagerly stepping in to the policy and legitimacy vacuum created by ICANN management's resistance of public accountability. This began right after ICANN authorized new top-level domains in the fall of 2000. Shortly thereafter, the director-general of the European Commission, Robert Verrue, sent a letter to ICANN's President proposing to give governments the opportunity to register or assign in advance the two-letter and three-letter ISO country codes in the new TLDs.<sup>14</sup> In other words, in the new top-level domains such as *.info*, the government of France should be given the right to register *fr.info* and/or *fra.info*. In essence, governments were claiming property rights in hundreds of domain names.

The government of the Republic of South Africa has taken an even stronger stance. It has objected to the common practice of registering country names in the second-level domain space, when the registrants "have no association or tie with that country." It goes on to say that:

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<sup>13</sup> GAC, ICANN communicated document, PRINCIPLES FOR THE DELEGATION AND ADMINISTRATION OF COUNTRY CODE TOP LEVEL DOMAINS, 23 February, 2000.

<http://www.noie.gov.au/projects/international/DNS/gac/library/ccdocs/cctld.txt>

<sup>14</sup> Letter from Robert Verrue, European Commission, to Mike Roberts, President of ICANN, 1 December 2000.

It is the position of the Republic of South Africa that second level domain names the same as Country Names are valuable national assets belonging to the respective sovereign nations. The country names in the gTLDs, particularly the dot-com TLD, have the potential to be of substantial political and economic value, particularly to developing nations.<sup>15</sup>

The rights claimed by the government of South Africa, however, have no basis in international law.

Shortly afterwards, the World Intellectual Property Organization (WIPO), at the request of several member states, initiated its second domain name policymaking process. As part of that proceeding, WIPO considered broadening ICANN's domain name dispute resolution policy to include geographic indicators – including not only country names but names of cities and other political subdivisions of states. It also proposed to exclude all two-letter country codes from the second level of all new generic TLDs.

But despite the aggressive assertion of property rights in names by governments, there was still a tacit understanding that any policy proposals they made still had to go through ICANN's own organic processes to become a part of the administration of the domain name system. That changed in September 2001.

## **The Montevideo GAC Resolution**

At ICANN's Montevideo, Uruguay meeting in early September 2001, the Government Advisory Committee (GAC) voted to intervene directly into the process of introducing new generic top-level domains. GAC issued a request that "the names of countries and distinct economies...should be reserved by the *.info* Registry in Latin characters in their official language(s) and in English and assigned to the corresponding governments and public authorities, at their request, for use. These names in other [non-roman] character sets should be reserved in the same way as soon as they become available."

Surprisingly, ICANN did not brush aside this claim, as it might have done only two years ago. Instead, ICANN's Board passed a resolution one day after it received the

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<sup>15</sup> Submission by Republic of South Africa in Response to World Intellectual Property Organization's WIPO2 RFC-2 Process, March 1, 2001.

request from GAC bowing in part to the GAC's wishes.<sup>16</sup> Specifically, the Board authorized Afilias to implement a freeze on any new registrations of ISO-3166-1 country codes under *.info*, and instructed Afilias to challenge any existing registrations made during the Sunrise period. These arrangements seem to have emerged from informal negotiations between GAC and Afilias. ICANN's President also agreed to come up with an action plan.

The implications of these actions upon the structure of ICANN's decision making and policy formation process should be clear. Fundamental policy decisions about who has the rights to names are being advanced at the 11<sup>th</sup> hour by an entity (the GAC) that under the original concept of ICANN simply does not have any policy making authority whatsoever. And yet, ICANN's management and its registry contractors have implemented its suggestions without any review by the DNSO or indeed even a public comment period that would allow the Internet community as a whole to react to the proposal. It would seem that GAC has stepped directly into the role of a policy making entity; not only is it acting as a Supporting Organization, but it seems to be "more equal" than other SOs, especially the DNSO.

The ICANN President's action plan made the situation even worse.<sup>17</sup> It proposed to retain the freeze on the 327 country codes under *.info* while a "discussion group" was formed to explore appropriate ways of dispensing the names. Incredibly, the proposed discussion group did not even include members of the Domain Name Supporting Organization, nominally ICANN's official body for formulating domain name policy. Instead, it included members of the ICANN Board, representatives of GAC, Afilias, and WIPO.

The DNSO was patted on the head and told to go off and ruminate on "possible approaches for longer-term arrangements concerning the use of geographic names within DNS."

It should be noted that under recognized international law, governments have no intellectual property rights in their country names. And in its second domain name process, the normally aggressive World Intellectual Property Organization (WIPO)

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<sup>16</sup> ICANN Board Resolution #01.92, 10 September 2001.

<http://www.icann.org/minutes/prelim-report-10sep01.htm#01.92>

<sup>17</sup> <http://www.icann.org/montevideo/action-plan-country-names-09oct01.htm>

pulled back from proposing to expand the domain name dispute resolution process to embrace rights to geographical indicators. The WIPO Final Report refers to “evidence of the widespread registration of the names of countries, places within countries and indigenous peoples as domain names by persons unassociated with the countries, places or peoples,” but concluded that “these areas are not covered by existing international laws and a decision needs to be taken as to whether such laws ought to be developed.”<sup>18</sup> WIPO’s caution was prodded in part by business trademark holders concerned about the potential confusion, and possible erosion of their rights, that might be caused by proliferating claims to names by governments, regions, and administrative entities. The lack of a recognized claim in international law did not deter the GAC, however.

### **Conclusions: A Threat to Private Governance?**

The GAC’s power grab has serious implications. It calls into question ICANN’s status as a bottom-up, private-sector organization and points toward its gradual absorption by governments as an international regime under their direct control.

ICANN is a policy making structure that can create and destroy rights and interests as they intersect with the domain name system of the Internet. Yet this policy making structure is not following the procedures for ensuring accountability to the Internet community set out in its own bylaws. One of the main rationales for creating a nongovernmental, consensus-based organization to administer the domain name system in the first place was that it was expected to be more accountable to and more closely reflecting the interests of the Internet’s users, developers and suppliers.

If ICANN becomes a method by which governments can make policy outside of any formal treaty framework then it is possible that it represents the worst of both worlds. As a private sector organization, it lacks formal representation and accountability, but it also has the monopoly power and legislative powers of a governmental organization.

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<sup>18</sup> WIPO, Final Report of the Second Internet Domain Name Process, <http://wipo2.wipo.int/process2/report/index.html>

Figure 1  
The Internet Corporation for Assigned Names and Numbers (ICANN)

