

# On the role of governments in Internet governance

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*This is a short summary of my position on the role of national governments in Internet governance. It relates to two of the themes of the consultation: 1) WSIS and 3) The Role of Public Authorities.*

1. The Internet is a global system. It creates a virtual space that is transnational, where geographic distance is unimportant. As such, there is an inherent tension between Internet governance and territorial national governments. By establishing rich and deep interlinking among its users, the Internet creates a *new* public, one that transcends traditional territorial boundaries and political groupings. By redefining the relevant public, it redefines the issue of who or what constitutes “public authority.”
2. So far, two institutional processes have attempted to respond to this problématique. One is the World Summit on the Information Society (WSIS). The other is ICANN’s Governmental Advisory Committee (GAC). My initial contention is that both WSIS and GAC have failed to respond adequately to this problem. We need to explore and define new approaches.

## ***WSIS and the Tunis Agenda***

3. The Tunis Agenda (TA) of WSIS squarely confronted the problem, but it did so from a backward-looking, conservative point of view. Put simply, WSIS tried to reassert the old system of national sovereignty. According to the Tunis Agenda, “policy authority for Internet-related public policy issues is the sovereign right of States.” (TA paragraph 35a) Following up on the work of the Working Group on Internet Governance, it tried to define the “respective roles and responsibilities” of governments, business and civil society. Its “roles and responsibilities” framework separates “technical and operational matters” from “public policy issues.” (TA paragraph 35). “[Governments should take responsibility for] “international public policy issues pertaining to the Internet,” but not the “day-to-day technical and operational matters, that do not impact on international public policy issues.” (69) Table 1 encapsulates the WSIS approach.

**Table 1: A False Solution**

Roles and Responsibilities for Internet Management in the Tunis Agenda

Public Policy	Technical - operational	Awareness, capacity building
<b>National Governments</b>	<b>Private Sector</b>	<b>Civil Society</b>

4. This proposed resolution doesn't work. It is a purely verbal categorization scheme that bears no relationship to the realities of Internet governance. There are three easily-identifiable flaws in this framework.

### **Public policy cannot be separated from technical management**

5. First, in Internet governance there is no clear separation of “public policy” from “technical and operational matters.” The two are deeply intertwined. Technical management processes are constantly raising policy issues; any attempt by external actors to impose public policies will have a major impact on the technology and operational procedures. ISP interconnection agreements and domain name registrar-registry interfaces, which are highly technical, can raise competition policy issues. Likewise, when Regional Internet Address Registries define highly technical requirements for the aggregation of address blocks, limit the transferability of addresses, establish methods for determining an organization's “need” for addresses, or set fees for addresses, they are defining “public” policies for the Internet industry. Those policies are fully integrated with the deep knowledge of the technical and operational issues of Internet addressing within RIR communities. All domain name and address policies developed and implemented by the non-governmental actors in the ICANN regime are “public,” in that they define the technical and economic structure of the Internet industry and so have important economic, technical and political consequences for Internet users worldwide.

### **Who is the public in “public policy?”**

6. Second, we must ask who is “the public” in the “public policy” invoked by WSIS? National governments do not have an unqualified right to speak for the global, internet-using public. As noted before, the Internet creates *transnational* communities which transcend traditional territorial boundaries. A policy viewpoint that is supported by a minority of 45% in the United States might be supported by a majority of the people when one includes Canada and Latin America. An Internet user in the U.S. who is engaged in intensive interactions with Internet users in China, Taiwan and Singapore has a profound stake in the policies of all those governments, yet votes or participates in only one of them. Any legitimate deliberation about the global public interest for the Internet must be based on a transnational community of actors. This public should not be equated with a collection of national publics, represented indirectly by national governments. When it comes to the Internet, the public interest is simply not the same as the interests expressed by a collection of national governments.

### **The problem of multiple sovereigns**

7. Even if one was willing to recognize a special role for national governments in the determination of Internet public policy, and even if one could clearly separate “public policy issues” from technical and operational management, there is a third problem. Governments do not speak with one voice on policy. National policies vary tremendously around the world and can contradict each other. Governments cannot invoke sovereignty in the determination of policy for the global internet, because globally applicable Internet policy involves multiple sovereigns. That is to say, *no one* has “sovereignty” over an integrated, transnational system of communication. This rather obvious fact was central to the rationale for making ICANN a nongovernmental entity in the first place. The idea

was to detach DNS coordination and policies from the territorial jurisdiction of national states in order to avoid these inter-jurisdictional conflicts.

### **ICANN and the Governmental Advisory Committee (GAC)**

8. The GAC of ICANN is another attempt to bridge the tension between national government and global Internet. But this approach, too, has serious problems. The GAC is an anomalous presence in the ICANN regime; it claims responsibility and superior authority over public policy and yet it is completely separate from ICANN's bottom-up, private sector and civil society-based methods for developing public policy. As I show below, this is an unstable solution that produces bad results.

### **The GAC and public policy**

9. ICANN and its GAC have been influenced by the same thinking that led to the WSIS Tunis Agenda's definition of roles and responsibilities. GAC now claims to have special authority over "public policy" in ICANN. A modification of ICANN's "Core Values" made in December 2002 asserted that "public policy matters" are a domain reserved to governments.<sup>1</sup> ICANN, while remaining "rooted in the private sector," bound itself to:  
...recognize[e] that governments and public authorities are responsible for public policy and duly tak[e] into account governments' or public authorities' recommendations.
10. This "core value" was given procedural form in Article XI, Section 2, number 1.<sup>2</sup> Here we see exactly the same unworkable assertion as in the Tunis Agenda. The assumption is that public policy matters can somehow be extracted from all the other decisions ICANN makes and relegated to the GAC. But as noted before, public policy concerns *cannot be separated* from the technical and operational decisions ICANN makes about new TLDs, Whois, root signing for DNSSEC, multilingual domain implementation, registry-registrar interfaces, escrow standards, and so on.

### **GAC as parallel policy making process**

11. So in practice, what really happens is that two parallel, imperfectly-integrated policy making processes exist in ICANN: one led by nonstate actors in the ICANN Supporting Organizations, the other based on governments in the GAC. GAC has no constituency in the Generic Names Supporting Organization (GNSO) and thus no voting representation on the GNSO Council.<sup>3</sup> GAC members rarely if ever participate as peers in the bottom up policy development processes. Thus, a policy product of the GNSO cannot be assumed to be an accepted output by the GAC, and a policy expressed by the GAC may not have

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<sup>1</sup> ICANN Bylaws Article 1, Section 2.

<sup>2</sup> "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."

<sup>3</sup> Although GAC has delegated a liaison to the GNSO, as someone who has been regularly involved in ICANN policy development processes in the years following the December 2002 change in the bylaws, I can vouch for the fact that these liaisons rarely show up and play mostly an observer role when they do show up in GNSO deliberations.

support or consensus in the Supporting Organizations. Worse, the meetings in which GAC deliberates are closed to the GNSO constituency representatives. GAC interventions do not follow the same schedule as the Supporting Organization policy development processes. GAC can issue a statement at any time (some have called it a “second-guessing” model of intervention), and it often has trouble moving at the same pace as the private sector/civil society working groups.

12. So instead of fully participating in policy development alongside nonstate actors, governments are *outside* the official ICANN policy development process. They are part of a separate “silo.” Their interventions can either conflict with the GNSO’s direction, or run parallel to it and never intersect. ICANN’s Board is constantly forced to improvise ways of bridging the gap between the two, which makes its policy making process uncoordinated, arbitrary and unpredictable. This also makes the policy making process easier to manipulate in unfair ways.

### **Worst of both worlds?**

13. This dual system of policy making can give us the worst of both worlds. The coercive power of governments is linked to a private corporation with monopoly control of critical internet resources; the governments are liberated from normal governmental due process and rights constraints while the private corporation lacks sufficient external accountability. GAC and its policy “advice” have no legislative or judicial checks and balances. Normally, when governments negotiate an international agreement, they must take them back to their democratically elected legislatures for ratification. If the agreements are inconsistent with the national constitution, they can be challenged in court. The governments typically must conform to freedom of information act requests and other due process requirements. None of these checks apply to the ICANN-GAC partnership. Also, ICANN’s Board has no clear, rule-based criteria for accepting or rejecting its advice. The ICANN Board can (arbitrarily) invoke the GAC to overrule its Supporting Organizations, or vice-versa. This is not a stable solution.

### **Some Proposals for Change**

14. Below I put forward some ideas for discussion and debate. These are deliberately formed at general levels to foster discussion around principles.

#### ***Get governments out of their silo in ICANN***

15. Insofar as governments wish to participate in ICANN’s global policy making, they should be considered another normal stakeholder in ICANN. They should participate in the policy development process in the same way, in the same processes, and with the same status as all others. It may seem strange to ask governmental staff members to participate in detailed working groups. But it already happens successfully, for example, in the Internet Engineering Task Force (IETF), where delegates from government agencies such as the U.S. Department of Defense or from other governments contribute as individuals to the standards-development process. Note also that this approach permits governmental representation to be diverse, embracing local and parliamentarian interests and not just a pseudo-homogeneous “national” approach. This means that GAC as a separate entity should be dissolved, and spaces for governmental actors created within the

Supporting Organizations and their Councils. By abolishing GAC, we are not saying that governments are unimportant. On the contrary; we are trying to integrate them more completely and effectively into ICANN's processes.

***ICANN's global governance regime should explicitly and formally yield control of purely national aspects, e.g. ccTLDs***

16. The ICANN system needs to more clearly distinguish between the domain of *national* authority and the domain of *global* authority. This is a more useful and important distinction than the false dichotomy between *public policy* and *technical management* proposed by WSIS. Delegation and policy for ccTLDs is a good example of a policy and law domain that is unambiguously national. ICANN should formally cede authority over ccTLD delegation to national governments and incorporate into its bylaws a commitment to passively implement delegation orders of national authorities. All other policy and coordination problems that involve disputes and policy problems caused by nationals interacting with nationals of the same country, within national territory, should also be left to national law. For all other matters involving global coordination and policy, national governments should yield to the ICANN/RIR process. These issues should be recognized as global, and the paradigm of national sovereignty abandoned. Also, by ceding issues such as authority over ccTLD delegation to national authorities, some of the most important objections to U.S. unilateral control of the root are avoided because the U.S. loses any claim to alter or interfere with country delegations.

***Insofar as governments wish to supervise ICANN globally, they should do so via globally applicable, collectively agreed treaties or laws – not through GAC***

17. There is an important distinction to be drawn between *laws* and *public policy*, yet this distinction is usually neglected in discussions of the role of national authorities in Internet governance. National governments can legitimately order global affairs by negotiating binding international treaties or laws. These laws must be consistent with their own constitutional constraints, and must (at least for most states) follow a democratic ratification process. Treaties and international laws that follow this pattern establish stable, fixed rules that civil society and Internet industry can use to guide their behavior; at best, they are applied to specific situations by impartial judges. Such treaties already exist (WIPO treaties, Cybercrime Convention, WTO agreement, etc.) and *no GAC is needed to develop them*.
18. On the other hand, Governments have no legitimate authority to make ICANN's management of the DNS or address space conform to shifting, politically-driven notions of *public policy*. National governments all have different policies; national publics all differ in their preferences and objectives. There is, therefore, no such thing as "global public policy." An informal collection of government representatives at an ICANN meeting has no standing to dictate global public policy. National governments must stop using "public policy" as the basis for their interventions in ICANN and other global Internet governance processes.
19. If the world's governments can agree on how ICANN and its powers over the Internet should be regulated; if they can specify rules that establish clear, enforceable boundaries

on ICANN's behavior and improve its accountability to the global Internet-using public; if they can then can negotiate a treaty or law that embodies those agreements, then they will have improved the situation. If on the other hand they cannot come to such a formal agreement, and instead try to use GAC to intervene on a month-to-month basis in ICANN's activities to shape results without any well-defined rules or procedures, they are exacerbating ICANN's problems. A lack of accountability, predictability and representation is already a big problem in ICANN. Governments only make these problems worse by trying to intervene via GAC.