



POLICY  
PAPER

# **Role of Governments at** --- **ICANN**

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# Role of Governments at ICANN

Gangesh Varma and Isha Suri

## 1. Introduction

### 1.1 The Internet Governance Ecosystem

Internet Corporation for Names and Numbers (ICANN) is one among many institutions in the internet governance regime complex.<sup>1</sup> One of the key chasms in internet governance deliberations was between multistakeholder and multilateral governance approaches.<sup>2</sup> It may be considered that the approach currently in existence is a hybrid format that includes both multilateral and multistakeholder approaches.<sup>3</sup> A cursory survey of organisations, institutions and processes in internet governance reveals this hybrid approach. For example, some internet governance occurs through international or multilateral institutions like the International Telecommunication Union (ITU) that is responsible for the allocation of wireless spectrum usage. Other examples would include specific parts of the UN system like the Group of Governmental Experts (GGE) or specific UN General Assembly resolutions. While these are established examples, there are other multilateral organisations that also creep into the internet governance regime as the utility of the internet itself evolves. For example, multilateral organisations like the World Trade Organisation (WTO) where ecommerce and digital trade negotiations take place. On the other hand, are multistakeholder organisations like the IEEE, IETF, and ICANN that are multistakeholder, but each have a different multistakeholder model in their operations. The IETF for example has a multistakeholder model that is divided more on the types of layers of the internet rather than the different stakeholder groups. One of the key aspects highlighted often is that there is no single multistakeholder model, but many, and therefore would be better off referred to as multistakeholder approaches or models in plural. There are different institutions and processes of internet governance that adopt different approaches to their participation in the regime complex and their creation or contribution to the governance regime thereof.<sup>4</sup>

### 1.2 Governments and Global Governance

While there are different types of multistakeholder approaches to internet governance, ICANN's model is considered a long-standing example of successful multistakeholderism in

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<sup>1</sup> See Nye, Jr., Joseph S. "The Regime Complex for Managing Global Cyber Activities." The Global Commission on Internet Governance, May 2014.

[https://www.cigionline.org/sites/default/files/gcig\\_paper\\_no1.pdf](https://www.cigionline.org/sites/default/files/gcig_paper_no1.pdf)

<sup>2</sup> See Dutton, W.H. "Multistakeholder Internet Governance" Background Paper, Digital Dividends World Development Report, 2016 available at <https://thedocs.worldbank.org/en/doc/591571452529901419-050022016/original/WDR16BPMultistakeholderDutton.pdf> (last accessed 12th July 2021)

<sup>3</sup> See generally Bygrave, Lee A. & Jon Bing, eds. *Internet Governance: Infrastructure and Institutions*. Oxford: Oxford UP, 2009.

<sup>4</sup> For example, UN related multilateral processes like GGE, multistakeholder like IGF, IETF, and shifting like ITU etc.

action.<sup>5</sup> The unique nature of the ICANN introduces a rather different position for governments in policy or law making. Traditionally, at both national and international levels, governments are the law-making authority. It is usually the governments or government designated regulators that make and enforce the regulatory framework. International law has long enabled the coordination of global relations, and interactions between nations, its people, and businesses. Yet, traditionally, the primary subject was always the state, and most regulation arose from state-to-state relations. However, with the passage of time and the advent of more globalised issues, the need for global governance approaches arose. This coupled with the recognition of other subjects of international law and non-state actors in the global landscape enabled the growth of multistakeholder governance. This departure from conventional international law making between state actors provided the opportunity for different stakeholder groups to participate in the building of regulatory regime. This has been seen not only in internet governance but also in other globalised issues such as climate change, business and human rights, and other global policy challenges such as food security etc. In the context of internet governance, it is often noted that multistakeholder approaches provide for accommodating plurality of interests. This paper will focus squarely on the role of governments in ICANN's multistakeholder model.

### **1.3 ICANN and its Multistakeholder Model**

ICANN is a not-for-profit corporation established under the laws of the State of California, in the United States of America (USA). It operates under the framework of a Memorandum of Understanding (MoU) with the US Department of Commerce.<sup>6</sup> ICANN's multistakeholder nature is reflected in its organisational structure that is divided into Board of Directors, Supporting Organisations and Advisory Committees. The Governmental Advisory Committee (GAC) is the main site of governmental involvement. There are currently 179 GAC members, and 38 observer organisations.

Historically, ICANN has always been a multistakeholder organisation from its inception, yet it has evolved its multistakeholder model over time. Furthermore, the role of the GAC within these multistakeholder structures has also evolved over the years. The reasons for these changes are manifold. It includes the change in the nature of the internet itself and the growth in the membership of the GAC, and generally the evolution of the internet from a research network to a general-purpose technology has played a big role in the constantly evolving regulatory dynamics of internet governance.

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<sup>5</sup> This is not to preclude the criticisms against ICANN or its multistakeholder model. Generally see - <https://www.tni.org/en/publication/multistakeholderism-a-critical-look>

<sup>6</sup> See <https://www.ntia.doc.gov/page/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporation-assigned-> (last accessed 12 Jul. 21)

## 2. Governmental Advisory Committee at ICANN

### 2.1 Formation of the GAC

Established in 1999, alongside ICANN's first public meeting, the GAC has operated continuously since then<sup>7</sup>. While being an early part of ICANN structure, it is important to note that the initial structure was designed for governments to play a peripheral role. One government however was an exception -the US government played a crucial role in the formation of ICANN, and designed it to be the 'privatization' of the internet's addressing system including names and numbers. The initial bylaws of ICANN ensured that governments would remain peripheral to the core functions of ICANN. For example, section 5 of the original bylaws from 1998 is:

"Section 5: Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (a) who holds an elective governmental office or (b) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies."

Apart from this fencing of the Board to keep government stakeholders at bay, the description of the GAC as envisaged initially in Section 3(a) of the bylaws is as below:

"(a) There shall be a Governmental Advisory Committee. The initial chairman of the Governmental Advisory Committee shall be appointed by the Board and shall hold that position until the election of his or her successor; subsequent chairs shall be elected by the members of the Governmental Advisory Committee pursuant to procedures adopted by such members. Members of the Governmental Advisory Committee shall be representatives of national governments, multinational governmental organizations and treaty organizations, each of which may appoint one representative to the Committee. **The Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements.** The Board will notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) and will consider any response to that notification prior to taking action." (*emphasis supplied*)

While the history of ICANN's formation clearly indicated an approach to keep governments at bay, and have a foundation of privatized governance, this approach was questioned. In 2002, merely 4 years after ICANN was created, the then President & CEO, Stuart Lynn led a proposal for reform of ICANN where he clearly noted "the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical."<sup>8</sup> Yet, he closely

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<sup>7</sup> See <https://gac.icann.org/about> (last accessed 12 Jul. 21)

<sup>8</sup> See <https://archive.icann.org/en/general/lynn-reform-proposal-24feb02.htm> (Last accessed 12 Jul. 21)

follows this with “for a resource as changeable and dynamic as the Internet, a traditional governmental approach as an alternative to ICANN remains a bad idea.”<sup>9</sup> Among others, one of the key issues he pointed out in ICANN’s structure was the role of governments and the need for structural reform for greater involvement of governmental stakeholders.

At this juncture, it is also important to note the unequal powers within governmental stakeholders. While on the one hand, governments collectively were restricted in their ability to engage with ICANN, on the other hand, the US government had oversight of ICANN and thereby exceptional powers.<sup>10</sup> This unequal scale of powers among governments and the special role of the US government in relation to ICANN was also a repeated subject of discord again during the Working Group on Internet Governance negotiations at the World Summit on Information Society (WSIS) and again almost a decade later, the issue would resurface and be partially resolved due to the IANA Transition.

### **3. Shifting Grounds: The Changing Role of the GAC?**

From its inception the GAC has undergone several changes in its scope and operation. As noted earlier, the ICANN reform proposal by Stuart Lynn had set in motion a tide of change in the attitude towards governments. Following this, some of the other significant milestones in the role of governments at ICANN are:

#### **3.1 GAC after the Affirmation of Commitments (AoC)**

One of the early significant shifts in this landscape of government relations for ICANN comes from the AoC. This document comes at the expiration of the Joint Project Agreement between ICANN and the United States Department of Commerce. The AoC was also in-part a response to the mounting pressure to cede the control that the US government had over ICANN. Clause 6 of the AoC clearly indicated the revised role of governments stating:

“DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.”

Similarly, Under Clause (9) of the AoC where ICANN commits to specific reviews, sub-clause (1) highlights that ICANN shall ensure accountability, transparency, and interests of global internet users and one specific mechanism to ensure this was through the role of the GAC by “assessing the role and effectiveness of the GAC and its interaction with the Board and making

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<sup>9</sup> Ibid at <https://archive.icann.org/en/general/lynn-reform-proposal-24feb02.htm> (Last accessed 12 Jul. 21)

<sup>10</sup> Kim G. von Arx and Gregory R. Hagen, *Sovereign Domains A Declaration of Independence of ccTLDs from Foreign Control*; 9 RICH. J.L. & TECH. 4 (Fall 2002) at <http://www.jolt.richmond.edu/v9i1/article4.html>; Jonathan Weinberg, ICANN and the Problem of Legitimacy, 50 *Duke Law Journal* 187-260 (2000) Available at: <https://scholarship.law.duke.edu/dlj/vol50/iss1/5>



recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;”

Thus, the AoC enhanced the role of the GAC within the ICANN ecosystem. While this did not essentially change the unequal powers vested with the US government, it signalled a change in relationship of governments with ICANN. Originally founded as a privatization strategy to keep governments away, ICANN was slowly increasing the role of governments. This would also add the much-needed legitimacy for a private non-profit organisation to coordinate the global internet’s addressing system.

This shift while significant was not adequate in fully realising the potential of governmental participation, nor enhancing ICANN’s globalised position. The most prominent shake up in the multistakeholder model comes with the IANA transition.

### 3.2 GAC after the IANA Transition

- Prior to IANA transition, government participation at ICANN was in the nature of advisory capacity on matters related to public policy through the GAC. However, the transition proposal put forth by the CCWG Cross Community Working Group on Enhancing Accountability (CCWG), provided GAC with the option of becoming a decisional participant through the new entity called ‘Empowered Community.’<sup>11</sup> According to this proposal, GAC would have an equal voice in the exercise of community powers including removal of the Board, approving bylaw amendments, budget, sale of assets, among others.<sup>12</sup> Some stakeholders such as the GNSO raised concerns that this allowed governments excessive control over the ICANN Board and therefore ICANN, threatening Internet freedom.<sup>13</sup>

In an attempt to address some of these concerns, CCWG introduced certain checks on GAC, including the following:

- Board of directors do not have to accept advice that go against the ICANN Bylaws. In fact, doing so could result in a challenge by the Empowered Community and even result in the removal of the entire Board.
- GAC’s special advisory status only commences in if there is consensus on the advice within GAC to ensure that the ICANN Board isn’t compelled to mediate between countries with opposing views.
- It also proposed that GAC Consensus advice can also be rejected if supported by 60% of the Board. Some, including GAC representatives, felt that this effectively renders GAC

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<sup>11</sup> Gangesh S.Varma, The Internet Holds Its Breath as Oversight Transition Plan Reaches Final Hurdle, The Wire (online), Mar 20, 2016, available at: <https://thewire.in/tech/the-internet-holds-its-breath-as-oversight-transition-plan-reaches-final-hurdle>, (last accessed on July 12, 2021).

<sup>12</sup> Empowered Community, available at: <https://www.icann.org/ec>, (last accessed on July 12, 2021).

<sup>13</sup> Gangesh S.Varma, The Internet Holds Its Breath as Oversight Transition Plan Reaches Final Hurdle, The Wire (online), Mar 20, 2016, available at: <https://thewire.in/tech/the-internet-holds-its-breath-as-oversight-transition-plan-reaches-final-hurdle>, (last accessed on July 12, 2021).

toothless. The exact threshold was a matter of compromise, as it shifted from 50% to 66%, to a final renegotiated compromise of 60%.<sup>14</sup>

Meanwhile, some GAC members were of the view that certain parts of the proposal singled out governments as stakeholders and restricted participation. This was the case with ‘stress test 18’, which the US considered necessary to get congressional approval while other Countries like Brazil and Iran among few others raised strong objections to the recommendations within the proposal. Eventually, the GAC concluded that it had no consensus on these controversial issues within the proposal. However, it categorically stated that it did not oppose transmission of the proposal to the ICANN Board.<sup>15</sup>

#### **4. GAC advice**

According to the ICANN Bylaws, GAC can propose issues to the ICANN Board directly, either through (i) comment, (ii) prior advice, (iii) specifically recommending action or new policy development, or (iv) revision to existing policies.<sup>16</sup> It is also worthwhile to note that GAC advice has a particular status under the ICANN Bylaws.<sup>17</sup> According to the Bylaws, the ICANN Board is mandated to take into account GAC Advice on public policy matters both in the formulation as well as adoption of policies. Furthermore, the Board is required to provide reasons if it pursues action inconsistent with the GAC Advice.<sup>18</sup> Pursuant to the IANA Transition, the ICANN Bylaws were amended to incorporate a higher voting threshold for the Board to determine not to follow the advice of the Governmental Advisory Committee.<sup>19</sup> The earlier threshold required a simple majority of the Board (50% + 1) to vote to not follow a piece of advice from the GAC.<sup>20</sup>

As such, advice to the ICANN Board is determined on the basis of consensus and GAC Consensus advice has the highest weightage and can only be rejected by a vote of no less than 60% of the Board. And, in case 60% of Board votes to reject GAC Consensus Advice, then the Board and GAC may in good faith choose to find a mutually acceptable solution.<sup>21</sup>

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<sup>14</sup> Aarti Bhavana, Legacy of Government Influence Looms as Internet Gears Up for Ownership Switch, The Wire (online), March 6, 2016, available at: <https://thewire.in/tech/legacy-of-government-influence-looms-as-internet-gears-up-for-ownership-switch>, (last accessed July 12, 2021).

<sup>15</sup> Gangesh S.Varma, The Internet Holds Its Breath as Oversight Transition Plan Reaches Final Hurdle, The Wire (online), Mar 20, 2016, available at: <https://thewire.in/tech/the-internet-holds-its-breath-as-oversight-transition-plan-reaches-final-hurdle>, (last accessed on July 12, 2021).

<sup>16</sup> Section 12.2 (ix), Bylaws for Internet Corporation for Assigned Names and Numbers, As amended Nov 28, 2019, available at: <https://www.icann.org/resources/pages/governance/bylaws-en>, (last accessed on July 12, 2021).

<sup>17</sup> Role of the GAC, ICANN, available at: <https://gac.icann.org/about/index>, (last accessed on July 12, 2021).

<sup>18</sup> Ibid.

<sup>19</sup> Proposed Bylaws Changes Regarding Consideration of GAC Advice, ICANN, available at: <https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en>, (last accessed on July 12, 2021).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

During the 2012 application round of the new gTLDs, Section 3.1 of the 2012 Applicant Guidebook stated that GAC Consensus Advice “*will create a strong presumption for the ICANN Board that the application should not be approved.*”<sup>22</sup> However, for the upcoming new gTLDs subsequent procedures, the GNSO council has recommended “*omitting this language in future versions of the Applicant Guidebook to bring the Applicant Guidebook in line with the Bylaws language arguing that the said text may have the unintended consequence of hampering the ability of the Board to facilitate a solution that mitigates concerns and is mutually acceptable to the applicant and the GAC as described in the relevant Bylaws language.*”<sup>23</sup>

For new gTLD applications, in addition to GAC Advice individual GAC members may also issue a GAC Early Warning – which is a notice to the applicant that an application is seen as potentially sensitive or problematic by one or more governments.<sup>24</sup>

Usually GAC Advice is conveyed to the ICANN Board the form of a communiqué issued at the end of each GAC meeting. Each communiqué and the minutes of GAC meetings are made available online.<sup>25</sup> Additionally, the GAC also carries out inter-sessional work in the form of teleconferencing, creating working groups on priority areas as identified by GAC. During ICANN 71, the GAC identified six areas of importance including Subsequent Rounds of New gTLDs, Domain Name System (DNS) Abuse, Accuracy, EPDP Phase 2 Operational Design Phase (ODP), EPDP Phase 2A, and CCT Review Recommendations.<sup>26</sup> GAC members also correspond through a GAC mailing list which is available only to GAC members, barring GAC correspondence available in public domain.<sup>27</sup> For the purposes of our analyses, we have referred to publicly available information on the GAC website since we did not have access to the GAC Mailing List.

## **5. Policy Development Flashpoints and the GAC**

### **5.1 New gTLDs and the GAC**

During the new gTLDs round in 2012, GAC members voiced their concerns through multiple GAC Early Warnings. Overall, nearly 240 individual GAC Early Warnings were issued in

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<sup>22</sup> Draft Final Report on the new gTLD Subsequent Procedures Policy Development Process, ICANN, available at: <https://gnso.icann.org/sites/default/files/file/field-file-attach/draft-final-report-new-gtld-subsequent-21sep20-en.pdf>, (last accessed on July 12, 2021).

<sup>23</sup> Ibid.

<sup>24</sup> GAC Early Warnings, available at: <https://newgtlds.icann.org/en/applicants/gac-early-warning#:~:text=An%20Early%20Warning%20is%20a,in%20rejection%20of%20the%20application>, (last accessed on July 12, 2021).

<sup>25</sup> GAC Advice, available at: <https://gac.icann.org/contentMigrated/icann71-gac-communique>, (last accessed July 12, 2021).

<sup>26</sup> Letter from GAC Chair to ICANN Board, Re: ICANN71 Virtual Policy Forum GAC Communique, June 30, 2021, available at: <https://gac.icann.org/advice/correspondence/incoming/20210630/icann71-virtual-community-forum-gac-communique>, (last accessed on July 12, 2021).

<sup>27</sup> Correspondence, GAC Advice, available at: <https://gac.icann.org/advice/correspondence/>, (last accessed on July 12, 2021).

relation to 200 new TLD applications accounting nearly for 162 unique strings.<sup>28</sup>With 129 warnings, the Australian Government accounted for a majority of these GAC Early Warnings followed by Germany (20) and France (19).<sup>29</sup> In the previous round, more than 100 of these GAC Early Warning were released for closed generic string applications with governments expressing concern over brands owning generic names and barring public registration in these namespaces.<sup>30</sup>

The Indian Government issued an Early Warning for nine (9) applications namely: (i) islam, (ii) bible, (iii) indians, (iv) ram (v) army, (vi) navy, (vii) airforce, (viii) halal, and (ix) shiksha.<sup>31</sup> All applications barring .indians, .islam, .halal and .ram have been delegated. The application for ‘.ram’ was withdrawn by Chrysler after multiple rounds of negotiations with the Government of India spanning over six years.<sup>32</sup>

Furthermore, nearly 18 GAC Early warnings were issued for concerns related to geographic nature of the string, these included .patagonia, .africa, zulu, 广州 (Chinese script for Guangzhou), and, 深圳(Chinese script for Shenzhen), among others.<sup>33</sup> Out of all these GAC Early Warnings, the Geographic Names panel considered Roma, Africa, 广州 [Guangzhou], and 深圳 [Shenzhen] were considered by the Geographic Names Panel to fall within the criteria for a geographic name as per the AGB.<sup>34</sup> Though not a formal objection, GAC Early Warning is a notice from members of GAC that an application is seen as potentially sensitive or problematic by one of the governments.<sup>35</sup> And GAC Early Warning could potentially pave way for GAC Consensus Advice. With respect to new gTLD applications, during ICANN 47 meeting held in Durban, the GAC issued consensus advice on the application for .amazon and its related IDNs in Japanese and Chinese,<sup>36</sup> and the application of .thai which is a transliteration

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<sup>28</sup> Yasmin Omer, First Insights from the GAC Early Warnings on New Top-Level Domains, CircleID (online), available at: <https://www.circleid.com/posts/20121121-first-insights-from-gac-early-warnings-on-new-top-level-domains/>, (last accessed on July 7, 2021).

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> GAC Early Warnings, Feb 19, 2019, available at: <https://gac.icann.org/activity/gac-early-warnings>, (last accessed on July 7, 2021).

<sup>32</sup> Kevin Murphy, Hindu god smites Chrysler gTLD, Domain Incite (online), Oct 11, 2019, available at: <http://domainincite.com/24838-hindu-god-smites-chrysler-gtld>, (last accessed on Jul 7, 2021).

<sup>33</sup> GAC Early Warnings, Feb 19, 2019, available at: <https://gac.icann.org/activity/gac-early-warnings>, (last accessed on June 27, 2021).

<sup>34</sup> Work Track 5 Final Report to the New gTLD SubPro PDP WG, Pg. 7-8, Oct 22, 2019, ICANN, available at: <https://www.icann.org/en/announcements/details/work-track-5-on-geographic-names-at-the-top-level--supplemental-initial-report-of-the-new-gtld-subsequent-procedures-policy-development-process-5-12-2018-en>, (last accessed on June 28, 2021).

<sup>35</sup> GAC Early Warning, ICANN, available at: <https://newgtlds.icann.org/en/applicants/gac-early-warning#:~:text=An%20Early%20Warning%20is%20a,in%20rejection%20of%20the%20application.>, (last accessed on June 27, 2021).

<sup>36</sup> GAC Communiqué – Durban, South Africa, July 18, 2013, ICANN, available at: <https://gac.icann.org/advice/communiques/public/gac-47-durban-communique.pdf>, (last accessed on June 27, 2021).

of Thailand's IDN ccTLD.<sup>37</sup> In the case of '.thai' the NGPC (ICANN's New gTLD Program Committee) accepted GAC Consensus advice and stated that the application would not be approved and the applicant had the option of withdrawing as per the terms and conditions or appealing against this decision.<sup>38</sup> The application was ultimately withdrawn. With regard to '.amazon', predominantly relying on the GAC's consensus objection, the NGPC rejected Amazon's (a globally well recognised e-commerce company) applications. It is also important to note that technically, "Amazon" did not fall under the definition of Geographic Names since it was not mentioned on the 3166-2 list.<sup>39</sup> Thereafter, Amazon's request for reconsideration was rejected by ICANN's Board Governance Committee on August 22, 2014. Subsequently, Amazon filed a Notice of Independent Review with the International Centre for Dispute Resolution on March 1, 2016. The IRP declared that Amazon has established that ICANN's Board, acting through the NGPC, acted in a manner inconsistent with ICANN's Bylaws. Further, the GAC, as a constituent body of ICANN, failed to allow the applicant to submit any information to the GAC and thus deprived the applicant of the minimal degree of procedural fairness before issuance of its advice, as required by the Bylaws. Ultimately, in 2019 the Board approved processing of the amazon applications according to the policies and procedures of the New gTLD Program. This also included publication of Public Interest Commitments (PICs) undertaken by Amazon Corporation to protect the culture and heritage of the Amazonia People.<sup>40</sup> The company also explicitly agreed to not apply for gTLDs with the names (or words) "Amazonas," "Amazonia" and close variants thereof.<sup>41</sup>

## 5.2 IANA Transition

During 2014, the National Telecommunications and Information Administration (NTIA) announced its intention to transition stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. NTIA asked the Internet Corporation for Assigned Names and Numbers (ICANN), as the IANA functions contractor and global coordinator for the Domain Name System (DNS), to convene a multistakeholder process to develop a proposal for the transition. While looking to stakeholders and those most directly served by the IANA functions to work through the technical details, NTIA established

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<sup>37</sup> Michael Berkens, Organization That Run Thailand's ccTLD (.Th) Objects To new the gTLD .Thai, August 18, 2012, available at: <https://www.thedomains.com/2012/08/18/organization-that-run-thailands-ccTld-th-objects-to-new-the-gTld-thai/>, (last accessed on June 27, 2021).

<sup>38</sup> ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué, Sept 10, 2013, ICANN, available at: <https://www.icann.org/en/system/files/files/resolutions-new-gTld-annex-1-10sep13-en.pdf>, (last accessed on June 27, 2021).

<sup>39</sup> AMAZON EU S.A.R.L. – Internet Corporation of Assigned Names and Numbers, ICDR No. 01-16-0000-7056, July 10, 2017.

<sup>40</sup> ICANN Correspondence, April 17, 2019, available at: <https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-17apr19-en.pdf>, (last accessed on June 27, 2021).

<sup>41</sup> AMAZON EU S.A.R.L. – Internet Corporation of Assigned Names and Numbers, ICDR No. 01-16-0000-7056, July 10, 2017.

a clear framework to guide the discussion and communicated to ICANN that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet<sup>42</sup>

This resulted in the first Work Stream (WS1) recommendations, which were eventually approved and incorporated into the bylaws of ICANN in 2016. The WS1 also comprised a provision expressing the need for a second WS since the first one could not cover all the requisite issues due to paucity of time.<sup>43</sup>

As such, the contract between the Internet Corporation for Assigned Names and Numbers (ICANN) and the United States Department of Commerce National Telecommunications and Information Administration (NTIA), to perform the Internet Assigned Numbers Authority (IANA) functions expired on Oct 1, 2016.<sup>44</sup>

Work Stream 2 (WS2) was launched at the ICANN meeting in Finland during March 2017,<sup>45</sup> and overall, the new work stream had 8 sub- topics including Diversity, Jurisdiction, Human Rights Framework of Interpretation, among others.<sup>46</sup>

The Government of Brazil submitted a dissenting statement on the draft report on Jurisdiction Submitted to The CCWG Plenary on 11 October 2017 on the grounds that the sub-group did not deal with the issue of ICANN's subjection to US jurisdiction and did not address the subject of US authorities such as legislature tribunals, enforcement agencies, regulatory bodies, etc.) having the ability to interfere with ICANN's activities.<sup>47</sup> However, the WS2 Final Recommendations were adopted by the ICANN Board in November 2019 without any changes to the issue of ICANN 's incorporation in the US on account of the minority statement released

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<sup>42</sup> NTIA Announces Intent to Transition Key Internet Domain Name Functions, NTIA, March 14, 2014, available at: <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>, (last accessed on July 7, 2021).

<sup>43</sup> Akriti Bopanna, ICANN Workstream 2 Recommendations on Accountability, The Centre for Internet & Society, Nov 23, 2018, available at: <https://cis-india.org/internet-governance/blog/icann-work-stream-2-recommendations-on-accountability>, (last accessed on July 7, 2021).

<sup>44</sup> Stewardship of IANA Functions Transitions to Global Internet Community as Contract with U.S. Government Ends, ICANN, Oct 1, 2016, available at: <https://www.icann.org/en/announcements/details/stewardship-of-iana-functions-transitions-to-global-internet-community-as-contract-with-us-government-ends-1-10-2016-en>, (last accessed on July 7, 2021).

<sup>45</sup> Akriti Bopanna, ICANN Workstream 2 Recommendations on Accountability, The Centre for Internet & Society, Nov 23, 2018, available at: <https://cis-india.org/internet-governance/blog/icann-work-stream-2-recommendations-on-accountability>, (last accessed on July 7, 2021).

<sup>46</sup> Ibid.

<sup>47</sup> Annex 4.2 – Jurisdiction Subgroup – Minority Statement – CCWG Accountability WS2 – March 2018, Government of Brazil, Oct 24, 2017, available at: <https://www.icann.org/en/system/files/files/ccwg-acct-sw2-annex-4-2-jurisdiction-minority-statement-27mar18-en.pdf>, (last accessed on July 7, 2021).



by Brazil. At present, ICANN is seeking to implement those recommendations through various implementation steps.<sup>48</sup>

### 5.3 Curative Rights Protection Mechanism IGO/INGOs

In June 2014, the Generic Names Supporting Organization (GNSO) Council began the Policy Development Process (PDP) to evaluate the protection mechanisms in place for names and acronyms for International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs).

Protecting the names and acronyms of International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs) at the top-level and second level of the DNS has been a long-standing issue over the course of the New gTLD Program. IGOs and INGOs face certain challenges in fully using the existing curative rights mechanisms at the second level of the Domain Name System (DNS) -- namely the Uniform Dispute Resolution Policy (UDRP) and the Uniform Rapid Suspension (URS) dispute resolution procedure for several reasons. IGOs see the Mutual Jurisdiction requirement for both processes as jeopardizing their jurisdictional immunity status. *“For both IGOs and INGOs, the fact that the UDRP and URS were designed as protective mechanisms for trademark owners means that they cannot use these procedures unless they also own trademarks in their names or acronyms. Both types of organizations are also concerned about the cost involved in using these procedures, which means diverting resources and funds from their primary missions.”*<sup>49</sup>

The GAC provided consensus advice to the ICANN Board in its Panama City Communique as follows:

The GAC advises the ICANN Board to:

- i. Maintain current temporary protections of IGO acronyms until a permanent means of protecting these identifiers is put into place;
- ii. Work with the GNSO and the GAC following the completion of the ongoing PDP on IGO-INGO access to curative rights protection mechanisms to ensure that GAC advice on protection of IGO acronyms, which includes the available “small group” proposal, is adequately taken into account also in any related Board decision; and
- iii. Continue working with the GAC in order to ensure accuracy and completeness of IGO contacts on the current list of IGO identifiers.<sup>50</sup>

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<sup>48</sup> Moving Toward Implementation: Next Steps for Work Stream 2, ICANN, May 8, 2020, available at: <https://www.icann.org/en/blogs/details/moving-toward-implementation-next-steps-for-work-stream-2-8-5-2020-en>, (last accessed on July 7, 2021).

<sup>49</sup> PDP IGO-INGO Access to Curative Rights Protection Mechanisms, ICANN, Sep 21, 2020, available at: <https://gnso.icann.org/en/group-activities/active/igo-ingo-crp-access>, (last accessed on July 7, 2021).

<sup>50</sup> GAC Communique, ICANN 63, available at: <https://gac.icann.org/reports/agenda%20item%203-igo%20curative%20rights-icann63.pdf>, (last accessed on July 7, 2021).

Even prior to the ICANN 63 Communique, GAC had issued advice to the Board on this topic, GAC Advice over the period 2012 to 2014 evolved from seeking preventative protection for IGO identifiers to supporting a curative dispute resolution mechanism that still reflects IGOs' status under international law. During the Hyderabad Communique, *GAC, alongside numerous GAC Observers, provided comments on the IGO Curative PDP Initial Report and stated – “None of which appear to have been adequately reflected in the Final Report. To the contrary, the “recommendations” of the IGO Curative PDP Final Report conflict with longstanding GAC Advice.”*<sup>51</sup>

In April 2019, the GNSO Council voted to adopt Recommendations 1-4 of the Final Report of the International Governmental Organization and International Non-Governmental Organization (IGO-INGO) Access to Curative Rights Protection Mechanisms Policy Development Process but *elected to refer Recommendation 5 to the Review of All Rights Protection Mechanisms (RPMs) in All gTLDs Policy Development Process (PDP) Working Group*. In January 2020, the GNSO Council adopted an Addendum to the RPMs charter to integrate consideration of Recommendation 5 and initiate a separate Intergovernmental Organizations (IGO) Work Track. The work track held its first meeting in February 2021 and has been meeting weekly, though it did not hold a session at ICANN71.<sup>52</sup>

In a nutshell, the PDP's efforts culminated with the following resolutions (adopted on: 18 April 2019)

Resolved:

1. The GNSO Council approves, and recommends that the ICANN Board adopt Recommendations 1, 2, 3 & 4 of the PDP Final Report. The GNSO Council directs ICANN staff to prepare a Recommendations Report for delivery to the ICANN Board in accordance with the process outlined in the ICANN Bylaws.
2. *The GNSO Council does not approve Recommendation 5 of the PDP Final Report and directs the Review of All Rights Protection Mechanisms in All gTLDs (RPM) PDP to consider, as part of its Phase 2 work, whether an appropriate policy solution can be developed that is generally consistent with Recommendations 1, 2, 3 & 4 of the PDP Final Report and:*
  - a. accounts for the possibility that an IGO may enjoy jurisdictional immunity in certain circumstances;
  - b. does not affect the right and ability of registrants to file judicial proceedings in a court of competent jurisdiction;

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<sup>51</sup> Agenda Item 3: IGO-INGO Access to Curative Rights Protection Mechanisms, GAC Secretariat, available at: <https://gac.icann.org/reports/agenda%20item%203-igo%20curative%20rights-icann63.pdf>, (last accessed July 7, 2021).

<sup>52</sup> Policy Briefing ICANN 71 Edition, ICANN, May 2021, available at: <https://gns0.icann.org/sites/default/files/file/field-file-attach/policy-briefing-icann71-28may21-en.pdf>, (last accessed on July 7, 2021).



- c. preserves registrants' rights to judicial review of an initial UDRP or URS decision; and
- d. recognizes that the existence and scope of IGO jurisdictional immunity in any particular situation is a legal issue to be determined by a court of competent jurisdiction.<sup>53</sup>

The ICANN Board is now considering Recommendations 1-4, considering Public Comments received. Regarding Recommendation 5, the IGO Work Track is continuing its substantive deliberations toward its aim of delivering its Initial Report in the latter part of 2021.<sup>54</sup>

#### 5.4 WHOIS Related

GAC members and the GAC's Public Safety Working Group (PSWG) have actively participated on a range of discussions dealing with developing a model to ensure compliance with the European General Data Protection Regulation (GDPR), particularly with respect to WHOIS data. Overall, GAC's engagement and discussion on the issue have broadly dealt with the following topics:

- Access to WHOIS access for legitimate purposes such as law enforcement, rights protection and cybersecurity;
- The need for clarity on specific details; and
- The role of the GAC in any new arrangements.<sup>55</sup>

As such, GAC advocates for the need to maintain WHOIS access to the fullest extent possible under the law. The GAC has also stated that the data of legal and natural persons should be distinguished from one another, and that public access to WHOIS data of legal entities should be restored. Legal person data is not protected by the GDPR, and its disclosure does not violate individual privacy. The issue of legal v natural persons is currently being dealt with EPDP Phase 2A – a work track initiated to deal with this issue specifically.<sup>56</sup> Furthermore, GAC has also stated the need to ensure that registration data is accurate. Even the Government of India through GAC has endorsed the need to ensure WHOIS to the fullest extent possible in order to ensure legitimate access to registrant data.

Specifically with respect to EPDP Phase 2, GAC has recommended further analysis of the financial sustainability of the proposed SSAD. Specifically, the GAC has posited that the costs

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<sup>53</sup> PDP IGO-INGO Access to Curative Rights Protection Mechanisms, ICANN, Sep 21, 2020, available at: <https://gns0.icann.org/en/group-activities/active/igo-ingo-crp-access>, (last accessed on July 7, 2021).

<sup>54</sup> Policy Briefing ICANN 71 Edition, ICANN, May 2021, available at: <https://gns0.icann.org/sites/default/files/file/field-file-attach/policy-briefing-icann71-28may21-en.pdf>, (last accessed on July 7, 2021).

<sup>55</sup> ICANN61 - Agenda Item 21 - GDPR and WHOIS Privacy Law Discussion, Mar 13, 2018, available at: <https://gac.icann.org/sessions/icann61-agenda-item-21-gdpr-and-whois-privacy-law-discussion>, (last accessed on July 7, 2021).

<sup>56</sup> Initial Report of the Temporary Specification for gTLD Registration Data Phase 2A Expedited Policy Development Process, ICANN, June 2, 2021, available at: <https://www.icann.org/en/system/files/files/epdp-phase-2a-initial-report-02jun21-en.pdf>, (last accessed on July 7, 2021).

related to the SSAD should be reasonable and appropriate for all stakeholders and should not discourage or limit use of the SSAD.<sup>57</sup>

## 5.5 2- or 3-character country codes at the second level

On 8 November 2016, the ICANN Board authorized registry operators implementing approved measures to avoid confusion with corresponding Country Codes<sup>58</sup> to release for registration to third parties all reserved letter/letter two-character ASCII labels at the second level in new gTLDs. Thereafter, the ICANN Board issued a blanked authorization on December 13, 2016, effectively retiring the former authorization process, wherein a registry operator's request was subjected to 60-day comment period and ICANN's review of comments. The erstwhile authorization process also mandated registries to notify Governments of their plans to use a country's 2-letter codes. GAC Members, including India have displayed strong reservations on how GAC Advice and comments by governments were taken into account, as well as on the appropriateness of the approved measures to avoid confusion.

It is pertinent to mention that in past India has opposed the release of 3 two-character ASCII labels, namely (i) “.in”, (ii) “.ln” (Ln) and (iii) “.1n” (one n)<sup>59</sup> for being deceptively similar to “.in” (India's ccTLD). Pursuant to ICANN's decision the GAC representative from India also wrote a letter to ICANN requesting it to reconsider the Board resolution allowing registration of country codes at the second level and also stated that the Indian Government is of the view that country and territory names should not be allowed at any level without prior approval from respective national governments.<sup>60</sup> However, ICANN did not reconsider its decision on the grounds that the mitigation measures in the agreement would be sufficient to deal with bad faith registrations, abuse, etc. As of now, two-character codes can be registered at the second level.

## 5.6 Delegation and Redellegation of ccTLDs

Country Code Top Level Domains (ccTLDs) are essentially two letter top level domains (TLDs) specifically designated for a particular country, sovereign state, or autonomous territory for use to service their community. These two letter domains are derived from ISO 3166-1 alpha 2 country codes.<sup>61</sup> When ICANN was formed in 1998, the Generic Top-Level Domains (gTLDs) such as .org and .com had to sign a contract with ICANN and be quasi-

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<sup>57</sup> Clarifying Questions and Updates – for 21 April 2021 Board-GAC Meeting, available at: [https://gac.icann.org/advice/correspondence/incoming/public/FINAL-GAC-ICANN70-Virtual%20Community%20Forum%20Communique-CQ-Scorecard-21April2021.pdf?language\\_id=1](https://gac.icann.org/advice/correspondence/incoming/public/FINAL-GAC-ICANN70-Virtual%20Community%20Forum%20Communique-CQ-Scorecard-21April2021.pdf?language_id=1), (last accessed on July 7, 2021).

<sup>58</sup> <https://www.icann.org/en/system/files/files/revised-measures-ltr-ltr-two-char-ascii-labels-country-codes-08nov16-en.pdf> (included as Annexure A).

<sup>59</sup> Two-Character Second-Level Domains (SLDs), ICANN, Feb 4, 2015, available at: [https://gac.icann.org/reports/public/150204%20memo%20%20char%20sld%20-%20distributed%20\(1\).pdf?time=1621641600030](https://gac.icann.org/reports/public/150204%20memo%20%20char%20sld%20-%20distributed%20(1).pdf?time=1621641600030), (last accessed on Jul 7, 2021).

<sup>60</sup> Letter from Sanjay Kumar Rakesh to Cherine Chalaby, ICANN, Nov 22, 2017, available at: <https://www.icann.org/resources/pages/correspondence-2017>, (last accessed on Jul 7, 2021).

<sup>61</sup> Qualifying top level domains, available at: <https://www.iana.org/help/eligible-tlds>, (last accessed on Jul 7, 2021).

regulated by ICANN. However, ccTLDs resisted such control<sup>62</sup>, and consequently, ICANN did not have the authority to take compliance action against ccTLD operators.<sup>63</sup> Furthermore, the GAC passed a set of principles in 2000 claiming national sovereignty over ccTLDs.<sup>64</sup> Subsequently, ICANN re delegated several ccTLDs in accordance with the new GAC principles. Ostensibly, ICANN adhered to the GAC Principles, however, re delegation of domains was subject to approval by the US Department of Commerce.<sup>65</sup> Domains such as .au (Australia)<sup>66</sup>, .jp (Japan)<sup>67</sup>, .bf (Burkina Faso)<sup>68</sup> to name a few. Technically, re delegation also known as ‘transfer’ means the process of changing the ccTLD manager from one entity to another.<sup>69</sup>

## 6. Way Forward

### 6.1 Enhancing scope of GAC’s role at ICANN

With the evolution of ICANN as an institution and the dynamic nature of internet governance that remains in flux, the role of the GAC within ICANN is bound to expand. This may vary on both the substantive and procedural aspects. Substantively, as noted in the earlier discussions, the GAC has engaged on numerous issues over time, the future also holds a more significant role for GAC. With growing number of national and regional regulations affecting the internet, ICANN will require more close coordination with governments to ensure compliance. Furthermore, new developments and proposals with respect to the internet's core, or underlying architecture would also require the inputs of governments to ensure potential public policy concerns are addressed. Procedurally, the GAC would also have to develop methods to ensure wider participation, and more meaningful engagement by developing countries. While there are several GAC working groups for specific topics and areas of work, the scope for creation of new working groups will need to be used to ensure timely responses to new developments. Given that ICANN's remit is narrow and specific, it also becomes important for GAC members to navigate the ICANN bylaws and diverse stakeholder perspectives from the community that highlight that ICANN may not be the right forum, nor venue to solve their public policy

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<sup>62</sup> Dr Farzaneh Badiie, ccTLDs: autonomous but cooperative actors, 2019, available at: [https://centr.org/library/index.php?option=com\\_attachments&task=download&id=9451](https://centr.org/library/index.php?option=com_attachments&task=download&id=9451), (last accessed on July 7, 2021).

<sup>63</sup> Ibid.

<sup>64</sup> Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee, GAC, 2000, available at: <https://archive.icann.org/en/committees/gac/gac-cctldprinciples-23feb00.htm>, (last accessed on July 7, 2021).

<sup>65</sup> Kim G. von Arx, and Gregory R. Hagan, Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control, *Richmond Journal of Law and Technology*, 9 *Rich. J.L. & Tech* 4 (2002), available at: <http://scholarship.richmond.edu/jolt/vol9/iss1/6>, (last accessed on July 7, 2021).

<sup>66</sup> IANA Report on Request for Redefinition of the .au Top-Level Domain, Aug 31, 2001, available at: <https://www.iana.org/reports/2001/au-report-31aug01.html>, (last accessed on July 7, 2021).

<sup>67</sup> IANA Report on Request for Redefinition of the .jp Top-Level Domain, available at: <https://www.iana.org/reports/2002/jp-report-08feb02.html>, (last accessed on July 7, 2021).

<sup>68</sup> Report on the Redefinition of the .BF domain representing Burkina Faso to the Autorité de Régulation des Communications Electroniques, available at: <https://www.iana.org/reports/2011/bf-report-07jan2011.html>, (last accessed on July 7, 2021).

<sup>69</sup> Delegation and Redefinition of country code top level domains, available at: [https://docs.google.com/document/d/1f0RfHgMjVSAfGMb\\_kN9e5oLOArqzWLOFwA6qCJENmk/edit](https://docs.google.com/document/d/1f0RfHgMjVSAfGMb_kN9e5oLOArqzWLOFwA6qCJENmk/edit), (last accessed on July 7, 2021).

concerns completely. While most issues that GAC raises as public policy issues being addressed are crucial to the sustainable future of the internet and its users, several of them would require the cooperation and coordination with any other institutions and processes to resolve. In such cases, the best approach forward would be to use the GAC within ICANN as an initiation point on the issue but where it is outside the scope of ICANN's remit, to simultaneously pursue the issues either bilaterally, or through other institutions and processes to ensure a holistic solution is developed – not in competition but through cooperation of the various actors and stakeholders in the internet governance ecosystem.

## **6.2 Areas of Priority**

Given that there are numerous areas of focus that GAC engages with, following are some important areas to prioritize

### *6.2.1 Diversity and Inclusion*

Inclusiveness is a permanent pursuit in multistakeholder internet governance. Diversity and inclusion are also a clear track under the Work Stream 2 accountability measures that has been adopted by ICANN. In the context of the issues that GAC deals with, these would include expanding the ability of the internet to be more accessible to the diverse populations from around the world. Specifically, under the ongoing policy development processes, the following steps can be undertaken to enhance diversity and inclusiveness at ICANN:

### *6.2.2 New gTLDs*

Expanding the new gTLDs through comes with a slew of public policy concerns especially with respect to geographic names including Geographical Indications (GIs), and potentially sensitive words or phrases being delegated. While the revised applicant guidebook envisages processes for GAC engagement including early warning, it is important for GAC to be proactive to ensure smooth delegation of new TLDs. However, more importantly, it is necessary that the GAC members enable greater participation from underrepresented regions and stakeholders in the TLD space. This could include TLD applications not only from developing countries, but also marginalised communities and stakeholders. The GAC can play a significant facilitating role in bringing in new application such that the diversity of ownership and representation in the domain name space is diversified and made more inclusive. This will require not only GAC engagement within ICANN, but also greater cooperation of GAC members regionally and bilaterally, and at their respective national levels. Within ICANN, GAC will need to consistently maintain efforts to make the new gTLD process both accessible and affordable. The GAC also needs to ensure that mistakes from the past round are not repeated such as limited number of applications from the global south, poor take off of the Applicant Support Program and lack of adequate representation from diverse applicant pool. Prior to the next round, GAC must also undertake outreach activities in the underserved regions and also ensure that ICANN org takes adequate steps to increase diversity and inclusiveness.

### 6.2.3 *IDNs and Universal Acceptance*

Another crucial aspect of improving inclusion and diversity in the domain name space is that Internationalised Domain Names (IDNs) and Universal Acceptance (UA). IDNs have been around for a while, yet its uptake in countries like India have not been remarkable. One of the challenges that dovetails in the uptake of IDNs is that of UA – that enables a seamless interoperable internet in different scripts.

### 6.2.4 *Global Public Interest*

The conception of global public interest is not without its challenges. While ICANN and its community members including the GAC has engaged deeply with the subject of public interest, and global public interest, it is not an issue that has been resolved. The internet as it is today can easily be considered a general-purpose technology, and therefore a public good and not merely an infrastructure operated by various entities for commercial gains. The subject of global public interest is hard to define, and amorphous – this also leads many stakeholders to be vary of its invocation, particularly by governments, that may indicate expanding the scope of ICANN’s remit beyond technical coordination. During the IANA Transition, ICANN had convened a strategy Panel on the Public Responsibility Framework that addressed this question directly.<sup>70</sup> Further in its development of the Strategic Plan, ICANN has repeatedly committed to keeping the global public interest in its decision-making. Furthermore, ICANN’s core values include a commitment to the global public interest. Yet, there is no universally accepted definition of global public interest and attempting it would be futile. In this context, it becomes clear that the role governments play in the realisation of global public interest is indispensable. Even while the GAC can become the venue for deliberation and recurrent invocation of global public interest, the challenge remains due to the diverse conceptions among GAC members themselves. Given the varying degrees of priorities and issues that national governments are dealing with, it is but natural to see varying aspects whether technical, economic, cultural, etc. However, while countries represent their national interests, they also are to represent the interests of their peoples, and this would significantly contribute to the development of global public interest. This is not to preclude that there would be competing interests, or that nations can act against the interest of its peoples. It merely ensures that governments can articulate their conceptions of global public interest and bring to the table a check-and-balance mechanism that would prevent a complete capture of the multistakeholder process to undermine global public interest. Towards this goal, it may also be of interest for the GAC to develop a working group to deliberate on this issue, with particular focus on its application in ICANN’s various contractual relationships, and its enforcement.

## **6.3 Improving Sustained Engagement of Indian GAC Delegation**

Even though, Indian GAC delegation has sought to enhance its engagement at ICANN, it’s approach thus far has been reactive in nature. In order to be considered as leaders in the global internet governance fora, it is imperative that India takes a more pro-active and nuanced

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<sup>70</sup> <https://www.icann.org/en/system/files/files/prf-report-15may14-en.pdf>

position on various issues being discussed at ICANN. Furthermore, it is also important to ensure a more sustained engagement on issues rather than an intermittent approach of responding to various issues being deliberated within GAC. For instance, GAC member from India volunteered to chair the GAC Working Group on Universal Acceptance in 2019<sup>71</sup> – in the near-term India must look to participate in various PDPs in order to influence policy making, especially in areas that are of high interest for Indian stakeholders such as the newly initiated EPDP on IDNs.<sup>72</sup>

### *6.3.1 National or Domestic Measures*

Some important measures can be taken purely at the national or domestic level for improving engagements of governments at the GAC. These measures would ensure more meaningful engagement during ICANN’s policy development processes, and ensure governments are better prepared, and better coordinated with their government machinery while engaging with ICANN through the GAC. Below are some examples for the Indian government to consider:

### *6.3.2 New gTLDs*

With the negotiations being finalised on the new gTLD subsequent procedures it is only a matter of time before applications are invited. To facilitate a diverse set of applications, India can begin the groundwork necessary to support the applications. In the past there have been several applications, but a few were rejected for specific reasons such as conflict with the geographic territories of other countries (.tata is an example). India could begin with greater familiarization of domain names and promote greater creation of digital identity through domain names. It must exhort its own government departments both at the centre and state level to harmonise under the .in ccTLD, and use the IDNs available. This would also increase awareness regarding the potential use for new gTLDs by these actors. Furthermore, an awareness campaign, and deliberations with various stakeholders particularly, including new gTLD owners in India will be helpful in identifying the gaps and help fulfil the needs for new applicants. The government could also consider providing applicant support services for stakeholders to ensure better compliance and have a higher success rate in the application process. Additionally, for the economically weaker stakeholder, the government could also consider providing financial support on terms that are mutually decided. Further, special attention can be provided to IDN applications. It may also be beneficial for the government to consider inviting community TLD applications, and new gTLD applications from GI rights holders. These will not only have benefits in terms of representation in the domain names space but also potentially great spill over effects for India’s digital economy.

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<sup>71</sup> Ajay Data, Universal Acceptance Continues Momentum During ICANN66, Dec 2, 2019, available at: <https://uasg.tech/2019/12/universal-acceptance-continues-momentum-during-icann66/>, (last accessed on July 12, 2021).

<sup>72</sup> ICANN GNSO Calls for Expression of Interest, June 2, 2021, ICANN, available at: <https://www.icann.org/en/announcements/details/icann-gnsocall-for-expressions-of-interest-chair-of-the-epdp-on-idns-2-6-2021-en>, (last accessed on July 12, 2021).

### *6.3.3 Coordination with relevant departments and ministries*

Noting that India's nodal agency for multistakeholder internet governance engagement is MEITY, it is rightly placed as the source for representation of India at the GAC. However, there are various work topics within ICANN that may require the engagement of more specific officers from the government. On some occasions these may be direct such as the case of legitimate access to registrant data. While in other cases, it may be indirect, such as domestic regulatory developments such as India's data protection laws, or the intermediary guidelines to name a few. Additionally, India's other international engagements through the Ministry of External Affairs, in UN related processes could also have implications for India's position within the GAC. This would mean that there is a requirement for greater coordination, and increased awareness between departments and ministries for creating a more holistic country position or approach to Internet governance.

### *6.3.4 Supporting diverse stakeholder engagement and convening national level discussions on issues*

One of the constant challenges faced is that of diverse stakeholder engagement in multistakeholder institutions and processes. In the case of ICANN engagement, even if the Indian GAC delegation has engaged consistently there are only a handful of stakeholders who have engaged continuously over the years. Most other engagement of Indian stakeholders have been ad-hoc and irregular. This is not uncommon at ICANN generally. However, to be able to achieve greater influence and better representation, a diverse, and consistently engaging stakeholder base is required. While this can be achieved through a narrow ICANN policy-based discussions, it would be sustainable to place it within the larger context of internet governance for wider outreach to stakeholders to enable more inclusion.

## **6.4 International or ICANN measures**

### *6.4.1 Engagement within the GAC*

The approach a GAC delegate takes in their engagement within GAC could be diverse. Several countries have a disruptive strategy and consistently raise objections, others are non-reactive, while some others are proactive on all issues. An effective general approach is a constructive approach to the deliberations. This implies that while providing an input, if an objection can be accompanied by a constructive proposal for a solution, it will be received better. Further being proactive in the engagement makes setting the agenda easier. However, the ability to set the agenda, and gain leadership roles relies not only on constructive approach and proactive nature, but also on a sustained, and consistent engagement. Furthermore, these measures also contribute to greater support from fellow members when participating in elections for leadership positions.

### *6.4.2 Building bridges*

Being the site of deliberations for several governments of the world, it is natural that the GAC also witnesses significant polarizing views between countries, and other stakeholders. India



can play the role of a bridge between diverse points of view. This may not be suitable on all occasions, given India's position on the specific issue. However, in several cases it may be on issues that does not impact India significantly, or at a stage when positions are not finalised – the general approach to provide a mediating force is greatly valued in the ICANN ecosystem and immensely useful in generating consensus.

#### *6.4.3 Participation and Contribution to CCWG and PDP*

Indian GAC members would gain greater traction with fellow GAC members when they participate in specific PDPs or CCWG that are focused on a specific topic/area. In the past, Indian GAC members have engaged with certain WGs and PDPs, however, their participation has often been as an observer and not as an active participant. Enabling the officers who are part of the GAC delegation to be able to participate with greater decision-making powers would be beneficial. Similarly, the ability to engage consistently over at least a period of three to four years would provide a greater sense of continuity and more sustained engagement within the GAC. Both these aspects contribute to the ability of a GAC delegate to participate effectively in the working group or PDP process. Given that most government officers are burdened with wide array of portfolios to look after, it would be good to consider having the option of a delegated permanent representative along with a team to aid.

#### *6.4.4 Engagement with other GAC members outside of ICANN Meetings*

Engaging with fellow GAC members either bilaterally, or in other internet governance events and processes is an important yet oft overlooked tool. It provides an opportunity to build rapport and relationships with these persons, and this contributes significantly to gaining greater acceptance and influence within the GAC. Furthermore, bilateral cooperation on various ICANN related issues can contribute to capacity building on specific areas as well (DNS abuse mitigation for example).

This paper has summarised the role of governments within ICANN, highlighting the transformation of the GAC over the years. The significant milestones and the flashpoints showcase the key features of the relationship governments have with ICANN, and also the importance of their larger role in the multistakeholder model of internet governance. The paper also proposes few steps to enhance the efficacy of governmental participation which are summarised below:

### **6.5 Recommendations**

1. Widen and deepen GAC engagement but within ICANN's remit
2. Sustained Engagement on Issues of Priority such as Inclusion and Diversity through New gTLDs, IDNs, and UA; and the Global Public Interest
3. Improving Sustained Engagement of the Indian GAC Delegation through:
  - a. National Level Measures



- i. Support for new gTLD programme, and general domain industry and user awareness campaigns
  - ii. Coordination and participation of relevant ministries and departments
  - iii. Supporting diverse stakeholder engagement and convening national level discussion on issues.
- b. International level measures or efforts to be made at ICANN
- i. Strategic shift in engagement within the GAC with proactive, and constructivist approach through sustained and consistent engagement
  - ii. Building bridges between polarised positions within GAC
  - iii. Active participation in and contribution to PDP, CCWG, or working groups within ICANN and GAC.
  - iv. Engagement with fellow GAC members outside of ICANN meetings

## **About ICRIER**

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