The Irritating Irresolution of ICANN Jurisdiction

The ICANN community review and Board approval of the draft Bylaws intended to implement the Work Stream 1 (WS1) recommendations of the Cross-Community Working Group on Accountability (CCWG-ACCT) are nearing completion. As we approach that marker it is worth remembering that a major impetus for the approaching transition of IANA functions control away from the U.S. Government (USG) to the multistakeholder community was the notion that termination of the remaining "clerical function" performed by the USG within the context of the current IANA contract would dampen criticism of ICANN's relationship with the USG and increase support for its multistakeholder model (MSM) -- in which governments play a complementary, advisory role to business, academic, and civil society actors.

However, even as the transition draws closer, ICANN's continued status as a non-profit corporation subject to U.S. law – its jurisdictional locus – is rapidly replacing the IANA contract as the new focus for displeasure by those who would have ICANN relocate to another jurisdiction – or even be transformed into a multilateral international intergovernmental organization (IGO), an outcome specifically prohibited under NTIA's approval criteria. The resolution of this extended debate will have profound ramifications for the future viability of the MSM of Internet Governance (IG), as well as for Internet speech free from governmental interference exercised from the top level of the domain name system (DNS). Until this matter is resolved with finality it will remain a scab to be constantly picked at, always threatening to become a festering sore on the body politic of IG.

Synopsis

One of the key selling points for NTIA's decision to relinquish its residual clerical role of reviewing and approving ICANN's proposals for DNS root zone changes – a role performed in the context of the current arrangement whereby ICANN contractually coordinates IANA root zone functions, and one that the USG has never used to block a proposed change -- was that the "irritation" resulting from that residual U.S. contractual relationship with ICANN discouraged broader embrace of the MSM by a middle group of nation-states.

However, despite the fact that ICANN has been a California non-profit corporation subject to U.S. law since its creation in 1998, its U.S. jurisdictional locus is replacing the IANA contract as a source of similar "irritation" as the impending fall 2016 transition of control from NTIA to stakeholders draws closer.

The revised Bylaws that will accompany the transition send a very mixed message on jurisdiction. On one hand, the overall accountability plan is geared to function optimally within the framework of California non-profit law. The new Empowered Community (EC) that will exercise accountability powers, and the Post-Transition ICANN (PTI) that will perform root zone functions, are both required to be chartered as separate California non-profit entities. Further, those requirements are both found within Fundamental Bylaws that require a higher threshold for amendment, and with any such amendment required to be communicated to the California Secretary of State.

On the other hand, the current Bylaws provision that requires ICANN to maintain its principal office in Los Angeles County has not been made a Fundamental Bylaw, leaving it more vulnerable to change. Additionally, although the revised Bylaws now include the three periodic reviews required under the 2009 Affirmation of Commitments (AOC) between ICANN and the U.S. (in contemplation of the likely termination of that agreement), they fail to incorporate the AOC requirement that ICANN itself remain a non-profit corporation headquartered in the U.S. That absence was a conscious decision of the CCWG-ACCT, where members who attempted to settle the jurisdictional question of ICANN's permanent locus were countered by others who maintained that it was not a core issue to be settled pre-transition, and should remain open for further discussion and decision-making.

Those are the results of WS1 of the Accountability process. WS2 includes a continued discussion of jurisdiction – and an explanatory Annex to the Accountability Proposal makes clear that consideration of the place of ICANN's incorporation, and potential alternatives, will be in order.

Meanwhile, developments in various multinational forums illustrate that the issue of jurisdiction has replaced that of the IANA contract for nation-states and other entities that wish to see ICANN change the locus of its jurisdiction – or even have the IANA functions transferred to an IGO (e.g., the ITU), or have ICANN take on that organizational guise.

It is in this political context that leaving ICANN's jurisdiction open for continued debate creates a possibility for dangerous mischief, given that increased governmental control over the coordination of IP addresses and DNS resources would confer accompanying control over the offering of Internet services, and that in turn can abet pervasive information censorship.

The issue is also surfacing within the context of U.S. politics. Congressional appropriators are threatening to extend a spending ban on facilitation of the IANA

transition, and Senators are requesting that the NTIA delay relinquishment of U.S. control until the transition and accountability framework can be road tested -- and WS2 issues, including ICANN's permanent jurisdiction, are resolved.

While it is too late to close out the jurisdiction debate in WS 1, this matter should be concluded as soon as possible in WS2 through adoption of a Fundamental Bylaw that commits ICANN to remaining a California non-profit corporation headquartered in the U.S. Such a resolution would be consistent with the existing requirements for the EC and PTI, and with the overall contextual framework of the accountability plan. It would also embrace ICANN's historic roots – and recognize the U.S. as a jurisdiction in which the rule of law can be relied upon and which, most importantly, is firmly committed against governmental information censorship by the First Amendment of its Constitution.

NETmundial's Failure to Solidify MSM Support

Just two weeks after NTIA's March 2014 announcement of its intent to transition the IANA functions, and a month prior to the NETmundial Conference engineered by then-ICANN CEO Fadi Chehade and currently embattled Brazil President Dilma Rousseff, Assistant Secretary Lawrence Strickling laid out the "irritation" argument at the ICANN 49 Meeting in Singapore. As reported at the time, Strickling had this to say about how the residual U.S. role undermined confidence in the MSM, while noting the ICANN community's desire to establish strong accountability measures to accompany the transition:

> *"Because people see **the US contract** as providing an overall sense of confidence about the system — **which has also been a source of irritation** — I fully expect community will want to start talking about that. Is there a vacuum of this larger question of accountability? We encourage that discussion — we haven't put it in play but we're not surprised community wants to talk about that and think that's good."* (Emphasis added)

A month later, just after the conclusion of the NETmundial Conference, the U.S. government declared that "The Multistakeholder Statement of Sao Paulo reaffirmed the multistakeholder model of Internet governance [and] endorsed the transition of the U.S. Government's stewardship role of IANA functions to the global multistakeholder community, consistent with our stated principles".

But at that time this author expressed some skepticism that removal of the IANA contract "irritation" would achieve the desired result. As I wrote in April 2014:

> *While NETmundial made incremental progress, it failed in one central aim. ICANN claimed that Brazil President Dilma Rousseff had been converted to a multistakeholder model advocate, and that holding this meeting in Brazil could bring the other BRIC nations along. But President Rousseff adopted a half-pregnant position in Sao Paulo, making the politically expedient declaration that there is "no opposition" between the multilateral and the multistakeholder approaches. One interpretation of this position is that governments must engage in a multilateral process in regard to IG, but then bring their consensus views to a broader multi-stakeholder process. But that presumes that governments — with their ability to make and enforce laws — will be content to just be equal stakeholders.*
>
> *There is reason to question that assumption. At NETmundial Russia, India, and China, along with other developing world nations, all strongly reiterated their support for a UN-led, government centric approach to Internet governance. Those nations collectively comprise about half the planet's population and the great majority of the next billion Internet users. And a more decisional IGF, along with the UN-affiliated ITU, may provide far more compatible venues for their goals than a one-off NETmundial meeting.*
>
> ***It is quite likely that NETmundial has set the stage for greater governmental involvement in IG issues… In retrospect, NETmundial may be regarded as the event that brought governments into the room with business, civil society, academia, and the technical community to chart the future of Internet governance. Whether the collective private and civil society sectors can truly be "multi-equal" with state power over the long run remains to be seen… for better or worse, the future of Internet Governance would appear to include much more engagement by governments, many of which are disposed to multilateral suppression of Internet freedom. So, while a bullet was dodged in Sao Paulo, the real drama and the foremost challenges lie ahead.*** (Emphasis added)

Unfortunately, that pessimistic prediction has turned out to be prescient, given increasing evidence that the actualization of the IANA transition has coincided with more active efforts to establish a government-dominated multilateral alternative to post-transition ICANN.

ICANN Has Been a California Corporation Since Day One

ICANN has been subject to California and U.S. Jurisdiction since its inception. Its Articles of Incorporation, adopted and unchanged since November 21, 1998, declare:

> ***This Corporation*** *is a nonprofit public benefit corporation and is not organized for the private gain of any person. It* ***is organized under the California Nonprofit Public Benefit Corporation Law*** *for charitable and public purposes… In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization,* ***the Corporation shall****, except as limited by Article 5 hereof,* ***pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet*** *by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).*
>
> ***The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law*** *and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.* ***To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.*** (Emphasis added)

Section 7 of the Articles contemplates the potential dissolution of ICANN by speaking to the distribution of its assets upon the termination of the non-profit entity established under its provisions.

Section 9 states:

> *These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.*

The Articles do not directly address the issue of what Board voting threshold would be required for dissolution of ICANN's current corporate status . It is also of significance that the dual requirement that any amendment (or vote of dissolution?) must also be ratified by two-thirds of any members would have been relevant if the ICANN community had not retreated after the Board advised it, just prior to the fall 2015 ICANN

54 meeting in Dublin, Ireland that it would never accept a membership model. In the face of that Board intransigence the community splintered and retreated to the “designator model” now embodied in the final accountability proposal.

By surrendering the statutory powers that would have been granted automatically under California law, the community has built ICANN accountability on the perceived and hopefully credible threat that individual Board members and/or the entire Board could be removed for taking actions at odds with the revised Bylaws or Mission Statement. But that threat to ‘spill the Board’ may still be less powerful than the forfeited statutory right for the community, if it had achieved “member” status, to have its own ratification vote on any Bylaws amendment.

Draft Bylaws Embrace U.S. Jurisdiction More Tightly – To A Point

A review of the draft revised ICANN Bylaws reveals a number of provisions that, on one hand, increase and strengthen its ties to Californian (and thereby U.S.) jurisdiction, while on the other hand leave the jurisdiction question less than completely settled and primed for further and potentially divisive debate:

- Section 6.1 (p. 42), in regard to the newly created Empowered Community (EC) that will exercise accountability powers, says “(a) **The Empowered Community (“EC”) shall be a nonprofit association formed under the laws of the State of California**”. (Note: As the Governmental Advisory Committee (GAC) is designated as a member of the EC, with freedom to opt in or out as a decisional member on each accountability issue raised within the EC, this raises the possibility that the GAC, composed of nation-states, may become part of a body that either brings or is subject to litigation within California state or U.S. federal courts. Whether this will subsequently result in any sovereign immunity concerns being raised by GAC members remains to be seen.)

- Section 16.1 (p. 93), describing the new Post-Transition ICANN entity (PTI) that will perform root zone functions under contract to ICANN, says “**ICANN shall maintain as a separate legal entity a California nonprofit public benefit corporation** ([“PTI”]) **for the purpose of providing IANA services**”.

- While ICANN itself is and always has been a CA nonprofit public benefit corporation, the only provision of the current Bylaws in any way relevant to that status is found at Section 24.1 (P. 137), which says “OFFICES. The **principal office** for the transaction of the business of ICANN shall be in the **County of Los Angeles, State of California, United States of America**. ICANN may also have an additional office or offices within or outside the United States of America as it

may from time to time establish." That provision just requires the principal office to be in LA County, but does not require ICANN to retain its nonprofit status or to remain incorporated under CA law or within U.S. jurisdiction – and it expressly permits ICANN to have offices located outside the U.S. It is unchanged in the new version of the Bylaws and, as later noted, has not even been modified to include Affirmation of Commitment (AOC) requirements that ICANN be a non-profit corporation headquartered in LA.

- Section 25.2 (p. 139) identifies the Fundamental Bylaws that can only be amended by a three-quarters Board vote and the approval of the EC. Articles 6 (EC) and 16 (PTI) are included – but not Section 24 (Offices). As a result, there is a high barrier to altering the requirement that the EC and PTI remain California non-profit associations, but much less of an impediment to altering the requirement that ICANN maintain its principal office in LA County.

- In a related matter, Section 25.2f (p. 140) requires that for any approved change in a Fundamental Bylaw "the Secretary shall cause such Articles Amendment promptly to be certified by the appropriate officers of ICANN and **filed with the California Secretary of State**".

- Notwithstanding the above provisions that tie the principal new structures to emerge from the transition and accountability processes, the EC and the PTI, to California, Section 27.2bvi (p. 143), relating to Workstream 2 issues, nonetheless lists "Addressing **jurisdiction-related questions**". That implies that there are remaining jurisdictional questions to be resolved, yet it fails to identify them. (Emphasis added)

Summing up, several new Bylaws provisions further tie ICANN to California nonprofit corporation law and to reporting changes in Fundamental Bylaws to its Secretary of State. While ICANN is presently a CA nonprofit corporation and has been from its inception, there is no Bylaws provision requiring it to remain so. And the Bylaws explicitly provide it with the authority to establish offices outside of LA County and overseas – and this provision is not a Fundamental Bylaw and thus can be more readily amended by the Board (further noting that, even without any Bylaws amendment, the ICANN entity could alter the jurisdictional locus of its corporate status while continuing to maintain its "principal office" in LA County; as we shall later see, "principal office' is not necessarily synonymous with "headquarters"). And "jurisdiction" is on the issues agenda for WS2 deliberation without any further identification of what jurisdictional issues are to be addressed, at least not within the Bylaws text.

Wither Work Stream 2?

Exactly what jurisdictional issues might be on the agenda for WS2?

Some guidance regarding the relevant views of the CCWG-ACCT can be found in Annex 12 of its Final Report [link].

> ***Jurisdiction***
>
> *Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN is incorporated under the laws of the U.S. State of California grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt.*
>
> *The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability.* ***ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.***
>
> ***ICANN's Bylaws (Article XVIII) also state that its principal offices shall be in California.***
>
> ***The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":***
>
> - ***Place and jurisdiction of incorporation and operations****, including governance of internal affairs, tax system, human resources, etc.*
> - ***Jurisdiction of places of physical presence****.*
> - *Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.*
> - *Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.*
> - *Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.*
> - *Meeting NTIA requirements* (Emphasis added)

That passage references the Article XVIII Bylaws requirement that ICANN is to maintain its principal office in LA County, but fails to explain why that provision was left as a non-

Fundamental Bylaw, and why it was not strengthened in concert with the new Bylaws provisions by an explicit requirement that ICANN remain a California nonprofit public benefit corporation (just like the PTI and EC, the two principal entities created to accommodate the IANA transition and exercise accountability over ICANN after the USG's withdrawal).

Paragraph 8 of the 2009 Affirmation of Commitments entered into by the U.S. and ICANN, and likewise referenced in that section of the Annex 12 explanation, reads as follows:

> *ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b)* ***remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community****; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.* (Emphasis added)

The commitments that could have added to the retained Section 24.1 Bylaws language is that ICANN must "remain a not for profit corporation, headquartered in the United States of America". There is no explanation of why that phrase was not added to the Section 24.1 "principal office" provision of the Bylaws, as it would have been consistent with and strengthened a key condition laid out in NTIA's March 2014 announcement of the intended transition -- that "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization [IGO] solution". (Note: While that specific requirement was not explicitly repeated in NTIA's March 11, 2016 statement regarding its approach to "Reviewing the IANA Transition Proposal", one presumes that it will speak to that issue in its review, and that Congress will also focus sharply on it while conducting oversight of the transition and accountability proposals.)

In regard to another jurisdictional point mentioned by the CCWG-ACCT – "Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships – that matter is already well settled in the current agreements with registrars and registries and would only require re-visitation of ICANN altered its own jurisdictional locus.

On this point, the current 2013 Registrar Accreditation Agreement states unequivocally:

> *5.8 Resolution of Disputes Under this Agreement. Subject to the limitations set forth in Section 6 and Section 7.4, disputes arising under or in connection with*

> *this Agreement, including (1) disputes arising from ICANN's failure to renew Registrar's Accreditation and (2) requests for specific performance,* ***shall be resolved in a court of competent jurisdiction or, at the election of either party, by an arbitration conducted as provided in this Subsection 5.8 pursuant to the International Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration shall be conducted in English and shall occur in Los Angeles County, California, USA****… In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award),* ***jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA****; however, the parties shall also have the right to enforce a judgment of such a court in any court of competent jurisdiction. For the purpose of aiding the arbitration and/or preserving the rights of the parties during the pendency of an arbitration,* ***the parties shall have the right to seek temporary or preliminary injunctive relief from the arbitration panel or in a court located in Los Angeles, California, USA,*** *which shall not be a waiver of this arbitration agreement.*

The standard Registry Agreement for the new gTLD program takes a somewhat different approach, although one that is still grounded in U.S. jurisdiction. Section 5.1 allows for pre-arbitration Mediation, which "shall be conducted by a single mediator selected by the parties". Section 5.2 covers Arbitration, and states:

> *Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce.* ***The arbitration will be conducted in the English language and will occur in Los Angeles County, California…. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.***

There is also an alternative Section 5.2 Arbitration text for intergovernmental organizations or governmental entities or other special circumstances of a registry operator, specifying that such disputes "will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Geneva, Switzerland, unless another location is mutually agreed upon by Registry Operator and ICANN". Such contract language in bilateral

agreements between private entities and IGOs is fairly standard as a means to avoid sovereign immunity defenses that could be asserted by the IGO in a national court.

As can be seen, the subject of jurisdiction for disputes between ICANN and contracted parties should not arise in WS2 – unless WS2 results in an alteration of ICANN's jurisdiction out of California or the U.S.

While the revised Bylaws do enhance the role of governments within ICANN by making the GAC a discretionary voting member of the EC, they do not convert the organization into one that is "government-led" and thereby cross one of NTIA's red lines. However, the continued debate that is ensured by placing jurisdictional matters within Work Stream 2 could well lead to agitation that ICANN morph into an IGO as a means of best escaping the legal jurisdiction of the U.S. or any alternative nation. A Bylaws commitment that ICANN would remain a not for profit corporation headquartered in the U.S., even placed within a non-Fundamental Bylaw provision, would have been an additional barrier against such future pressure. As noted, efforts to settle the matter pushed by some CCWG-ACCT members were resisted by others, with the resulting decision to "kick the can" to WS2.

Paragraph 11 of the AOC also contains language that is conveniently not mentioned in Annex 12:

> *The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties.* ***Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party.*** (Emphasis added)

Such termination is quite likely, as retaining the AOC after completion of the IANA transition would run completely counter to the goal of removing the "irritation" of unique relationship between ICANN and the U.S. Indeed, the probability that ICANN will terminate the AOC in close proximity to the transition's completion is clearly contemplated by the draft Bylaws. That expected termination is the very reason why the three separate periodic reviews established by paragraph 9 of the AOC to ensure that ICANN is maintaining accountability, transparency and the interests of global Internet users; preserving security, stability and resiliency; and promoting competition, consumer trust, and consumer choice, have been enshrined in Subsections b, c, and d of Section 4.6 of the draft Bylaws. But the nonprofit corporation and headquarters provisions of the AOC did not receive similar treatment.

Annex 12 concludes its discussion of the jurisdictional issue as follows:

> *At this point in the CCWG-Accountability's work,* ***the main issues that need to be investigated within Work Stream 2 relate to the influence that ICANN´s***

__existing jurisdiction may have on the actual operation of policies and accountability mechanisms__. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, __but not necessarily the location where ICANN is incorporated__:

__Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues__ and include:

- *Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.*
- *__Identifying potential alternatives__ and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.*
- *__Consider potential Work Stream 2 recommendations__ based on the conclusions of this analysis.*

A specific Subgroup of the CCWG-Accountability will be formed to undertake this work. (Emphasis added)

The fact that the location where ICANN is incorporated is "not necessarily" going to be considered within Work Stream 2 means in actual practice that consideration of changing the locus of its incorporation – currently the State of California in the United States of America – would be an entirely proper focus for WS 2 consideration. Indeed, Annex 12 makes it abundantly clear that the jurisdictional considerations of WS 2 will include "identifying potential alternatives" to ICANN's long-standing jurisdictional locus within the United States, as one cannot "focus on the settlement of dispute jurisdiction issues" without considering the locus of ICANN's own jurisdiction.

While making clear that a recommendation for a change in jurisdiction would be entirely permissible at the conclusion of WS2, the CCWG-ACCT has provided no explanation in Annex 12 why the revised Bylaws both strengthen ICANN's jurisdictional ties to California while simultaneously leaving this core fundamental issue unsettled.

Jurisdiction Replaces IANA as the Source of "Irritation"

With the issue of jurisdiction sure to be the focus of continued discussion and debate in Work Stream 2, what evidence can be found that termination of the remaining formal U.S. relationship with ICANN will not calm the push for ICANN to sever its jurisdictional locus with the U.S.?

Disturbingly, there are many:

- While Appendix A of the CCWG-ACCT Proposal is titled "Documenting Process of Building Consensus", it actually consists mostly of dissenting Minority statements.

  The "Minority Statement by Olga Cavalli", which is "supported by the governments of Argentina, Benin, Brazil, Chile, Commonwealth of Dominica, France, Guinea, Mali, Nigeria, Paraguay, Peru, Portugal, Russian Federation, The Democratic Republic of Congo, Uruguay, Venezuela" does not focus on the jurisdiction matter. Rather, it embodies the collective views of those GAC member governments regarding the "GAC carve-out" adopted by the CCWG-ACCT to prevent the GAC from being a decisional member of the EC in the context of a community challenge to Board implementation of GAC advice. It states:

  > *the attempts of some stakeholders to take advantage of the IANA transition in order to reduce the ability of governments to be part of the – to be enhanced – community, have jeopardized the success of the overall process, and more broadly,* ***have put at risk our trust in what has brought us all here in the first place: the multi-stakeholder approach****… only the demands of part of the community representatives were met, at the expense of GAC; therefore, rather than "compromise", "winner takes all" would actually be a more accurate description of what is proposed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations.* (Emphasis added)

  These dissenting governments, having proclaimed that their faith in the MSM "at risk" may well provide a nucleus of support within the GAC for aggressive attention to the jurisdictional matter.

- Officials of the French government, a supporter of the above-cited Minority Statement, made additional declarations in March against the transition plan. As reported at the time:

  > *The French government has slammed the agreement to move the domain name system out from under US control and hand it to Californian non-profit ICANN.*
  >
  > *The French believe the move hands too much control to internet giants like Google and Amazon.*
  >
  > ***Speaking to leading French newspaper Le Monde, French government officials said that the transition plan will lead to the "privatization of ICANN, not its internationalization."***

Axelle Lemaire, minister for the digital economy, put out a statement on Thursday which complained: "Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize States in the decision-making processes of ICANN, especially compared to the role of the private sector."
… ***It also noted that the US government still retains significant control over ICANN, since it remains a non-profit organization based in California under US law, as opposed to an international organization like the United Nations or Red Cross, which operate under international law.*** (Emphasis added)

- The impending IANA transition has not squelched efforts within the International Telecommunications Union (ITU) to transition IG matters to an intergovernmental body. As described in a recent article by Ambassador David Gross:

Although there has been a recent cease-fire as Internet governance debates have focused more on the role of ICANN, those skirmishes may soon restart at the ITU. ***Indeed, Internet-related issues already are moving from the periphery of discussions in the ITU's Telecommunication Standardization Sector (ITU-T) to the top of the agenda at many ITU-T study group meetings… Indeed, at a recent meeting in April, foreign ministers of Russia, China, and India agreed on "the need to internationalize Internet governance and to enhance in this regard the role of [the ITU]****… Importantly, and little noticed at the time, decisions at PP-14 [2014 Plenipotentiary Conference held in Busan, South Korea] nevertheless subtly but materially broadened Internet-related work at the ITU in other, potentially significant ways. These changes were accomplished through several Resolutions adopted at Busan, reflecting a strategic shift on the part of some governments that significant changes can be made merely by the adoption of Resolutions (which drive the ITU's agenda for a four-year cycle and beyond), rather than the more controversial process of changing the ITU's jurisdiction by amending the Constitution and Convention.* ***Notably, many of the new or amended PP-14 Resolutions refocused the ITU's work beyond telecommunications and into more problematic areas such as Internet content and applications, cybersecurity, and Internet policy, among others****… The increased attention paid by governments to the work of ITU-T study groups should trouble affected businesses as well as others and encourage them to understand the deeper meaning beneath the technical nuts and bolts at the ITU… Businesses and others may find it worthwhile to monitor the activities of these various ITU-T study groups — they effectively may set the international regulatory environment for many aspects of the Internet and new technologies. Indeed, although study group outcomes theoretically are voluntary, the ITU-T study groups' work often is*

converted directly into domestic law in many countries, or could become international "norms," or even treaties, and thus mandatory standards.

As governments working within the ITU context seek to set standards and thereby enhance governmental control over key Internet policy areas, voices are likely to be heard that the pressure for such measures can be alleviated by altering ICANN's jurisdictional locus, based upon a likely false premise that the ITU agitation can be squelched by transforming ICANN into an IGO.

- U.S concern regarding China's intentions on IG and related matters resulted in the issuance of an unexpected and somewhat extraordinary joint press release from Ambassador Daniel A. Sepulveda and Assistant Secretary for Communications and Information Lawrence E. Strickling on May 16th. It stated that:

  > *the Chinese government's recent actions run contrary to China's stated commitments toward global Internet governance processes as well as its stated goals for economic reform… Even if applied to Chinese-registered domain names,* ***China's approach to DNS management within its borders could still contravene, undermine, and conflict with current policies for managing top level domains that emerge from the Internet Corporation for Assigned Names and Numbers (ICANN), which follows a multistakeholder model*** *in its community-based and consensus-driven policymaking approach.*

  While there is nothing new in the statement's authors' advocacy for the MSM, it is unusual for U.S. officials to so directly and strongly publicly criticize the Internet policies of another nation. In retrospect this statement may be seen as the opening salvo in a more public debate over the MSM versus other IG approaches – a debate that inevitably involves jurisdictional issues as China and other critics of the MSM will cite ICANN's U.S. jurisdiction as a reason for mistrust.

- Russia and China are also actively cooperating to enhance Internet censorship, and citing U.S. control of key Internet intermediaries as a rationale.

  As reported in early May:

  > *the first China-Russia forum on Internet sovereignty took place in Moscow under the auspices of Russia's government-endorsed Safe Internet League… At the Moscow meeting last week, Lu Wei, the head of the Chinese delegation and the Communist Party's Internet security chief, said, "Now our countries are faced with an aggressive media propaganda. Therefore, we should pay serious attention to verification and filtering incoming information."*

> ***Fang Binxing, generally credited as the architect of the Great Firewall*** *(sometimes more warmly called the Golden Shield),* ***argued in his own remarks*** *— judging from the live tweets by Andrei Soldatov, a Russian Internet dissident and coauthor of The Red Web —* ***that American hosting companies currently control the Internet and those companies are in turn controlled by the U.S. government. The argument was that the U.S. is sovereign over today's Internet and the only real question is whether sovereignty will be shared.*** *Russian participants echoed these concerns and the conference concluded with a resolution to pursue further research and coordination between the two countries to advance toward the goal, articulated many times now by Chinese President Xi Jinping, of establishing the separate sovereignty of each nation in cyberspace.*

Another report on the same meeting emphasizes how China is pushing its concept of "internet sovereignty" in opposition to the suspect MSM, and for the purpose of strengthening government censorship of the Internet:

> *Chinese and Russian censors met at the "Seventh International Safe Internet Forum" in Moscow on April 27 to share ideas on controlling their citizens' access to the internet. Leading the forum on the Russian side was Russia's chief internet censor Konstantin Malofeev, "a key player in Moscow's drive to tame the web and limit America's digital influence." Malofeev is the founder of Russia's "Safe Internet League," which hosted the event. Representing China were cyberczar Lu Wei and "Great Firewall of China" mastermind Fang Binxing… A university classmate of Russian president Vladimir Putin, Bastrykin has said that Russia should stop "playing false democracy" and give up "pseudo-liberal values" such as press freedom and freedom of expression, and should start "using China's experience as a model to counter pressure from the United States." China, now in the business of exporting internet censorship technology to authoritarian regimes around the world, was only too happy to help.*
>
> *A major theme of the event was China's pet theory of "internet sovereignty," the polar opposite of the "borderless" internet envisioned in liberal democratic societies. This theory seems to be based largely on an authoritarian notion of the "right" of governments to control their citizens' thoughts and activities, again the polar opposite of the democratic concept of rights as vested in the individual. What we in liberal democratic societies understand as "freedom," Chinese and Russian censors see as Western "hegemony."…* ***In any case, authoritarian states appear to be trying to establish a system of their own for internet governance as***

an alternative to the "hegemonic" Western democratic system they dislike and fear. This is but one facet of the "China Model" or "Beijing Consensus" of authoritarian development that China is trying to build up and normalize internationally as a competing model to the "Washington Consensus" that China considers hostile to its national interests.

- ICANN has just announced that ICANN 57 will take place in early November in Hyderabad, India. That meeting may well feature some coordinated critiques of ICANN's U.S. jurisdiction from the Indian government and host country organizations. In addition to India's cooperation with China and Russia within the ITU, civil society voices within that nation have focused upon ICANN's continued post-transition U.S. jurisdiction as a central focus of criticism.

  India's Economic Times published a May 12th critique titled "The Internet can't end up being governed only by American laws". Its main points follow:

  > *Whether a private entity can govern cyberspace so vital to all nations for their economic growth and national security is a big question… Icann is an NGO in California, governed by the laws of the state and of the US. Governments, other than American, have little control over Icann, even as it governs the cyberspace on most aspects of policies that are sovereign rights of states… In this debate, the UN and its agencies like the International Telecommunication Union have been kept out in the name of multi-stakeholderism… That the creation of the Internet was based on this model does not mean that it is the only appropriate way to govern it. The US government has used all the instruments at its disposal - diplomacy, coalition-building, engaging with Silicon Valley companies and other standards bodies, NGOs, human rights groups - to get Icann accepted as the global authority to run the Internet… The Icann board is elected by, and accountable to, its constituents, which number only about 100 in naming, numbering, and protocol organisations. In all, it is a closed group, a clique that has hitherto governed the Internet and will continue to do so. It will operate not under international laws, but under US laws…* ***Has the transition to the Internet Assigned Numbers Authority (IANA) that started a couple of years ago achieved its purpose of providing legitimacy to Icann, with the additional 'bonus' of Washington retaining control over the Internet? The answer is probably yes… Cyberspace should be the next frontier for India and other countries.***

The world wants Icann to be governed by - and to be accountable to - international laws. (Emphasis added)

A March 23rd Op-Ed in the influential Hindu newspaper made a similar argument:

More significant, at least for those outside the U.S., is what does not change. The main problem that non-U.S. actors have with the U.S. control over ICANN is that it can unilaterally interfere with the ICANN's policy process, and the Internet's root server (containing the authoritative root zone file). ***Post transition, it will no longer be able to do so with a direct fiat to ICANN. However, the numerous judicial, executive and legislative powers held by the U.S. government over ICANN as an American organisation remain unchanged.***

The fear was never of the U.S. casually interfering with ICANN or the root server. It is exceptional situations that remain a problem area. The U.S. President has various kinds of emergency powers regarding key infrastructure, which is likely to extend to ICANN and the root server. Then there is the Office of Foreign Assets Control, which has seized foreign assets in the U.S. on the flimsiest of geopolitical grounds. A country's domain name, like .in, in the root server can be considered as its asset inside the U.S. It is also possible that the Federal Communications Commission, having recently declared Internet service as a public utility, might at will seek jurisdiction over ICANN-managed critical Internet resources. And, of course, the U.S. legislature can make any kind of law affecting any aspect of ICANN and the root server.

The greatest likelihood of the U.S. government's interference comes from the judiciary….

All in all, therefore, the real problem of the U.S.'s executive, legislative and judicial control over ICANN and the root server will not change with the current proposal. This is a serious matter. What is required is to get ICANN incorporated under international law, with host country immunities for an international organisation.

Jurisdiction issue

Despite strong exhortations by some of its members, the key question of jurisdiction over ICANN was not taken up by the group that developed the proposal. This issue has been moved to the

> ***second phase of this group, which could go on beyond the expected date of transition. This remains the main issue to resolve for any real change and progress.*** *But the commitment of the U.S. government and other U.S. actors to consider any such change remains suspect. The U.S. government and the board repeatedly put up redlines whenever there were structural proposals that could ensure a greater latitude within the system to embrace change. And they succeeded at every point, because the so-called 'community' was eager to keep the U.S. government pleased, lest they simply refuse the transition altogether. This is hardly a democratic way of decision-making on such an important issue as ICANN's new oversight mechanism. But the 'community' remains most interested to have power fully transferred to itself, even if within U.S.'s jurisdictional oversight, rather than go by larger global public interest concerns…* ***What ICANN needs, therefore, apart from coming under international jurisdiction, is some kind of external oversight, which, however, need not be of governments.***

That Op-Ed is likely a preview of the views that will be voiced during the WS2 consideration of the jurisdiction issue by those who will never be satisfied until ICANN is completely divorced from U.S. jurisdiction and the accompanying legal framework -- with the ultimate divorce being ICANN's conversion into an IGO subject to so-called "international law". From its author's perspective, "the key question of jurisdiction over ICANN…remains the main issue to resolve for any real change and progress", indicating that the IANA transition is not regarded as meaningful change or progress.

Indeed, some members of CCWG-ACCT WS2 working group have already voiced similar concerns and views during its initial discussions. And there are now reports that some governments, claiming inequitable distribution of IP addresses as rationale, are starting to move to a dangerous "middle ground" that contemplates the shifting of some IG functions to a multilateral context.

What seems abundantly clear is that hopes that the announcement of the IANA transition, and the output of the NETmundial conference, would result in greater support for the MSM among the BRIC nations have not been realized. Brazil and India, while still supporting multistakeholderism to some degree, nonetheless remain committed to government dominance of IG. And Russia and China remain openly hostile to the "western hegemony" and "pseudo-liberal values" that they view as inherent in the MSM.

The greatest danger for those who believe that ICANN should remain a MSM entity, based of necessity within a national jurisdiction rather than a multilateral IGO with accompanying domination by governments, is that if this jurisdictional

issue is permitted to fester it may become a rallying point for disaffected blocs within the ICANN community and the GAC. A "heads in the sand" decision to defer a definitive decision just keeps the issue alive and the MSM vulnerable to an ICANN Bylaws change.

The danger of a disaffected stakeholder bloc working in tandem with like-minded GAC members cannot be dismissed. While the revised Bylaws encompass the principle that GAC advice to the Board must be reached by full consensus and absent formal objection, it establishes no such requirement for GAC decisions on whether to join the EC on a particular accountability manner, or how to determine the GAC position thereon. It is not difficult to envision a potential scenario in which a majority of the Board is at risk of being removed by the community, the GAC by majority vote determines to amend its Operating Principles (OP) for its decisional process within the EC to one that does not require full consensus, and the GAC then leverages its ability to be the determining vote on Board removal to bring pressure on the Board to effect a change in ICANN's jurisdictional locus.

Some may assert that such a scenario is improbable, but it remains more readily possible so long as ICANN's commitment to remain a non-profit California corporation is not enshrined in a Fundamental Bylaw. In any event, Principle 53 of the GAC OP clearly sets forth that, "A Member or Members may move, at a meeting, for these Operating Principles to be open to revision…. The deciding vote… shall constitute a simple majority of the Members who are present at the meeting at which it was moved for these Operating Principles to be revised."

Potential Impact on U.S. Facilitation of the IANA Transition

As the September 30th end date of the current IANA contract between ICANN and the NTIA approaches, renewed tensions between Congress and the Administration are surfacing, and the jurisdiction issue is starting to get increased attention on Capitol Hill.

On the Appropriations front, on May 18th the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies reported out its FY 2017 funding bill for the Department of Commerce. That money bill extends the current prohibition on the spending of any appropriated funds by the NTIA to complete the transition into the next fiscal year, which starts on October 1, 2016. The full Appropriations Committee is scheduled to take up and report the bill on May 24th.

NTIA head Lawrence Strickling has stated in the past that the spending prohibition, while not inhibiting NTIA's ability to monitor and review ICANN developments and plan for the transition, would prevent it from relinquishing control of the IANA functions.

Speaking at the January 2015 Congressional Internet caucus "State of the Net" conference, he said:

> *The act does restrict NTIA from using appropriated dollars to relinquish our stewardship during fiscal year 2015 with respect to Internet domain name system functions. We take that seriously. Accordingly, we will not use appropriated funds to terminate the IANA functions contract with ICANN prior to the contract's current expiration date of September 30, 2015. Nor will we use appropriated dollars to amend the cooperative agreement with Verisign to eliminate NTIA's role in approving changes to the authoritative root zone file prior to September 30. On these points, there is no ambiguity.*

If Senate Appropriators follow the same path, or accept the House position when reconciling the Commerce Appropriations bill, it will set the stage for a possible confrontation with a White House that has not hesitated to maneuver around Congressional edicts with its own Executive Orders. Some have opined that NTIA could avoid the spending prohibition by simply letting the current IANA contract expire, an act that arguably incurs no monetary costs. But as NTIA has placed ICANN under contract to perform the IANA functions it is difficult to see why they would revert to ICANN, rather than back to NTIA, upon expiration. Further, the entire transition is premised upon NTIA affirmatively transferring its root zone change review authority and contract renewal accountability clout to the multistakeholder community embodied in the new PTI and EC, an act that arguably requires some positive action on its part. It would of course be preferable if the IANA transition were not caught up in a partisan political battle, possibly including Congressional litigation against Executive Branch action, but in a hotly contested Presidential election year events could spin out of control.

Also scheduled on May 24th is a Senate Commerce Committee oversight hearing on "Examining the Multistakeholder Plan for Transitioning the Internet Assigned Number Authority". This promises to be a far more feisty affair than a March 24th House Energy and Commerce hearing on "Privatizing the Internet Assigned Number Authority", which was largely characterized by bipartisan praise for the ICANN's community's efforts to shape the transition and accountability measures.

Senate Commerce members includes former Presidential aspirants Marco Rubio and Ted Cruz, and both these republican Senators have now embraced an idea promulgated on April 4th by the conservative think tank The Heritage Foundation. In a background paper titled, "ICANN Transition Proposal: The U.S. Should Proceed with Caution", authors Brett D. Schaefer and Paul Rosenzweig do not argue against the transition per se, but rather advocate for an interim testing period in which the U.S. retained continued oversight, positing:

uncertainty with regard to how this new ICANN structure would operate should lead the U.S. to retain some oversight until there is confidence that it will work smoothly as envisioned. To that end, we recommend a "soft extension" of the existing contractual relationship—one that allows ICANN two years to demonstrate that the new procedures it is putting in place actually work to hold the corporation accountable. The transition to a multi-stakeholder global system is too important to get wrong and too important to rush… Even if the NTIA and Congress are satisfied with the proposal, the proposed changes in ICANN's structure and governance model are significant and untested. It would be prudent to allow ICANN to operate under the new structure for a period of time to verify that unforeseen complications and problems do not arise while retaining the ability to reassert the historical NTIA relationship if unforeseen complications do arise… the current proposal… does propose radical changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN. It would therefore be prudent to maintain the current arrangement, or at least a means for reasserting NTIA oversight, for the next two years until the new structure proves itself… Prudence dictates caution. The U.S. should take the time to make sure that everything is working properly before executing an irreversible decision.

At the time of this article's publication, Sen. Rubio was circulating a draft letter addressed to Assistant Secretary Strickling that, while commending the ICANN community in developing "a transition proposal that would maintain the security, stability, and resiliency of the Internet's Domain Name System (DNS)", and while noting that "there are many positive aspects to the proposal", nonetheless states;

However, the Internet is too important to allow the transition to occur without certainty that the proposed accountability measures are adequate and that ICANN's new governance structure works properly. Therefore, we respectfully request that you consider an extension of the NTIA contract with ICANN to ensure that the many changes in the transition proposal are implemented, operate as envisioned, and do not contain unforeseen problems, oversights, or complications that could undermine the multi-stakeholder model or threaten the openness, security, stability, or resiliency of the Internet… In finalizing your review of this proposal, we request you consider an extension of the NTIA contract with ICANN with the goal of ensuring that the transition establishes a stable system that reinforces the multi-stakeholder model and does not contain unforeseen problems or consequences that could jeopardize the security, stability, and openness of the Internet.

The draft Rubio letter also notes that "there are many details of the proposal that have yet to be developed, much less finalized", but does not specifically cite the WS2

consideration of jurisdiction as a concern. It is not yet known which other Senators will sign onto this letter, or when it will be sent to NTIA.

Of more direct relevance to this article, on May 19th Senator Cruz, joined by Senators James Lankford and Mike Lee, dispatched a letter to Strickling as well as Commerce Secretary Penny Pritzker that likewise requests a delay in the transition – and that specifically cites the unresolved jurisdiction matter as one rationale for that view. Their letter states:

> ***Fourth, there is concern that ICANN may consider moving its headquarters outside the United States to escape U.S. law and redraft its bylaws, once the transition has been finalized.*** *During a recent CCWG-Accountability "Review of Draft Bylaws" meeting on April 11, 2016, a representative for Iran stated, "We should not take it granted that jurisdiction is already agreed to be totally based on U.S. law."* ***Iran was supported by representatives from Argentina and Brazil who suggested that jurisdiction should be a subject for work stream 2, which as previously discussed, will not be subjected to review by the administration or Congress.*** *Moving ICANN's jurisdiction to outside the United States would be an obvious deviation from ICANN's Affirmation of Commitments, which affirms a commitment to "remain a not for profit corporation, headquartered in the United States of America."*
>
> *This issue is far from resolved. Indeed, the transition proposal clearly states: "The ICG [IANA Stewardship Transition Coordination Group] also notes that a change in jurisdiction at the time of transition of stewardship -given the implications on ICANN and PTI accountability -would increase the complexity of the proposal and increase the level of risk in the transition. The ICG recognizes that jurisdiction remains an important issue that needs to be addressed based on a clear assessment of the implications of different options."* ***Simply put, ICANN is not reaffirming its commitment to the United States government to remain headquartered in the United States. The fact that this issue has been deferred to an unspecified point in the future when the U.S. would have a far lesser voice in the transition process raises questions about ICANN's intent on this matter.*** (Emphasis added)

Responding to the Rubio and Cruz suggestions for a transitional extension of the IANA contract, Prof. Milton Mueller has just opined:

> *The idea of a "test drive" is probably well-intentioned, but in fact it is an impractical idea that would completely disrupt the legitimate process. The new bylaws will be passed by the ICANN board sometime in late May. If the NTIA deems that the proposal the Internet community spent two years developing*

meets its criteria, it has repeatedly promised to implement the transition and end its contractual control of ICANN. Backing away from that commitment because of last-minute pressure from a few U.S. politicians would be a complete betrayal of the hundreds of people who worked hard developing the reforms and the millions of people worldwide who support them. The credibility of the U.S. government and the transition process would be shot. Such a move would also empower the cynics in Moscow, China and Europe who have always intimated that the US would never let go…

Quite apart from the breaking of a vital commitment, the idea of a "test drive" of new institutional arrangements doesn't make sense. Either ICANN is ultimately accountable to the U.S. government or it is accountable to the global multistakeholder community. There is really no middle ground here. If the US government has the authority to pull the plug on the reforms or alter them unilaterally, then everyone will know that it is the real authority and the new accountability arrangements cannot really be used or tested. The actors in this space will appeal to the NTIA when they don't get what they want, and continue to reinforce the community's dependence on the US government. You can't really do laboratory experiments or "test drives" when making changes in governance institutions.

This author is not swayed by the argument that a short extension of the contract would "empower the cynics in Moscow, China and Europe". As this article has amply documented, those parties are at best committed to transferring control of the root zone functions to an IGO beyond the jurisdiction of any nation, and at worst are dedicated to using the DNS as a means of pervasive information censorship.

However, the argument that a "test drive" in which the U.S. retains ultimate control is no real test seems more convincing; the only way to know if the community-pedaled ICANN bike will remain upright is to remove the IANA contract training wheels. In addition, presuming that all the required elements enunciated by the NTIA are in place by September 30th, intervening against the transition would likely cause deep dejection in, and divisions between, many sectors of the ICANN community that has drawn together and striven so mightily to develop a transition and accountability blueprint under significant time pressures. An ironic and unintended effect of it could also be r increased community pushback against the concept of cementing U.S. jurisdiction during WS2, thereby leaving the jurisdiction matter unresolved and irritating for an extended time period.

Conclusion: The Jurisdictional Debate Needs Near-Term Resolution

So has the impending extinguishment of the IANA functions contract between ICANN and the USG, and the transition of the IANA functions to control of the multistakeholder community (to the extent it is embodied within ICANN), lessened the "irritation?" As this article documents, several proposed revisions of ICANN's Bylaws enmesh it more deeply within ICANN's framework of California nonprofit business association law, and thereby U.S. jurisdiction. At the same time, rather than logically and decisively resolving the question of ICANN's permanent grounding in U.S. jurisdiction and law, the CCWG-ACCT kicked the can down the road by retaining the issue of jurisdiction as a matter to be further addressed in WS2, without in any decisive way limiting what jurisdictional matters remained to be settled by taking ICANN's own jurisdictional locus off the table.

For the sake of legal clarity and organizational stability, it is incumbent upon WS2 participants to resolve this matter as soon as feasible – and to come down decisively in favor of a permanent link between ICANN and U.S. jurisdiction. If this were a matter of first impression then impartial consideration of an alternative national jurisdiction might be in order. But it is a not a matter of first impression, and multiple factors weigh in favor of enshrining ICANN's permanent status as a California non-profit corporation in a Fundamental Bylaw:

- ICANN has embodied California non-profit status since its founding in 1998
- With the EC and PTI required to be California non-profits by revised Fundamental Bylaws, an inconsistent status for ICANN itself could raise confounding legal and policy issues for both accountability and control of the root zine functions
- The accountability plan has been designed to be maximally effective in the context of California law
- The U.S. legal system is well regarded for its dedication to objective determinations under the rule of law
- Perhaps most importantly, the First Amendment of the U.S. Constitution guarantees that the U.S. government cannot take actions that would coerce ICANN into using its root zone control to abridge free speech.

Reaching final resolution on the jurisdictional question will be no easy task. The ICANN community makes decisions on the basis of consensus, which translates into a determined and vocal minority being able to exercise effective veto power over the will of a majority (noting that this author is no way prejudging whether the majority of ICANN stakeholders, who are not from the U.S., would press hard for a Bylaws change locking ICANN into U.S. jurisdiction on a permanent basis). ICANN's Board has not demonstrated any inclination to fight for much beyond preservation of its own powers and prerogatives, and would likely be unwilling to confront a sizeable segment of the community and GAC opposed to final settlement on U.S. jurisdiction when those same

actors could someday be deciding on the ejection of one or more Board members for official acts.

So the inclination will be to keep kicking the jurisdictional can down the road. But the problem with that approach is that the MSM is only compatible with a nonprofit public benefit organization akin to ICANN, and such an organization must be grounded in some national jurisdiction, as the alternative is an IGO – an outcome specifically rejected by NTIA evaluative criteria. So long as the question remains unresolved, ICANN's U.S. jurisdiction, despite the fact that it makes the most sense for the many reasons cited above, will be cited as a cause of "irritation" by all the forces who would prefer to see ICANN's root zone control transferred to a multilateral IGO, where it could then be politicized and employed for censorship and other nefarious purposes. Of course the same parties will be equally, if not more, critical if U.S. headquarters and jurisdiction are enshrined in a Fundamental Bylaw – but taking that step will at least make it much more difficult for them to further the goal of governmental dominance of IG in the DNS context.

It is most unfortunate that WS1 did not resolve the critical matter of ICANN jurisdiction. The only way to ensure that ICANN does not devolve into an IGO is to enshrine ICANN's permanent status as a California non-profit in a Fundamental Bylaw during the course of WS2. That would not only be consistent with one of NTIA's key principles but is the only means to assure that business, civil society, and the technical and academic sectors remain the stakeholders in charge of the critical root zone functions -- rather than have them fall under the sway of governments, with all the dangers that would accompany a future transition of ICANN's status from the MSM to an IGO.

Note: *The author would like to acknowledge that the impetus for this article came from Gordon M. Goldstein, Adjunct Senior Fellow at the Council on Foreign Relations (CFR) and Managing Director at Silver Lake. Mr. Goldstein presided over a CFR event held in Washington on April 27, 2016 titled "The ICANN Transition, American Interests, and the Future of the Internet". In preparation for that event, he asked the author to be prepared to comment on the presentations of the main speakers, and to specifically look into and be prepared to discuss the manner in which the draft revised Bylaws addressed ICANN jurisdictional issues. That initial research inspired the author to delve further into the matter and to write this article. The views expressed in the article are solely those of the author and not those of the CFR, or any other organization or client with which the author is associated.*